Form No. 7

San Francisco
Law Library

No. 97241

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 7483

Vol 1851

United States Circuit Court of Appeals

For the Ninth Circuit.

EDNA SMART SHERMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 7483

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:
E. D. TURNER, Jr., Esq.,
A. E. JAMES, Esq.

For Comm'r.:
E. A. TONJES, Esq.

Docket No. 65593

EDNA SMART SHERMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

1932

May 4—Petition received and filed. Taxpayer notified. Fee paid.

" 5—Copy of petition served on General Counsel.

Jun. 7—Answer filed by General Counsel.

Aug. 10—Copy of answer served on taxpayer. Circuit Calendar.

1933

Jul. 13—Hearing set for week of Sept. 25, 1933, San Francisco, California.

Sep. 29—Hearing had before Mr. Lansdon, Div. 8. Called 9/25/33—heard 9/29/33 on merits. Stipulation of facts filed. Briefs due Nov. 20, 1933.

1933

Oct. 18—Transcript of hearing of Sept. 29, 1933 filed.

Nov. 20—Brief filed by taxpayer.

" 20—Brief filed by General Counsel.

Dec. 21—Opinion rendered, Mr. Lansdon, Div. 8. Decision will be entered for the respondent.

" 28—Decision entered, Mr. Lansdon, Div. 8.

1934

Mar. 24—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 28—Proof of service filed.

May 7—Notice of the appearance of A. E. James as counsel for taxpayer filed.

" 9—Praecipe filed.

" 9—Proof of service of praecipe filed.

" 9—Agreed statement of evidence lodged.

" 10—Agreed statement of evidence approved and ordered filed. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

Before the United States Board of Tax Appeals

Docket No. 65593

EDNA SMART SHERMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency N. P.-2-28, dated March 7th, 1932, and as a basis for her proceeding alleges as follows:

I.

The petitioner, EDNA SMART SHERMAN, is an individual residing at 285 Jayne Street, Oakland, California.

II.

The Notice of Deficiency, a copy of which (together with the Revenue Auditor's Report made a part thereof) is attached hereto, marked Exhibit "A" and made a part hereof as if herein fully set forth, was mailed to the petitioner on the 7th day of March, 1932.

III.

The taxes in controversy are income taxes for the year 1929 and for approximately $7,243.90. [2]

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) That the Commissioner erred in determining the income of the petitioner for the year 1929 from the Leander S. Sherman Trust;

(b) That the Commissioner erred in determining that one-half of the salary of the husband of the petitioner, Frederic R. Sherman, is taxable to the petitioner.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(A) With reference to the error hereinabove in subdivision (a) of paragraph IV set forth, petitioner alleges:

(1) On or about the first day of September, 1921, Leander S. Sherman and Katie Sherman, his wife, did make, execute and deliver to Leander S. Sherman, Katie Sherman, Phillip T. Clay and Frederic R. Sherman, as Trustees, a conveyance and declaration of trust, and did at said time convey, set over and transfer to said Trustees the property referred to in said declaration of trust, a copy of which is attached hereto, marked Exhibit "B", and made a part hereof as if herein fully set forth;

(2) That under and pursuant to the terms of said declaration of trust the income thereof, after the payment of any and all expenses in con- [3] nection with the administration of the trust, and after the death of Leander S. Sherman and Katie Sherman, his wife, is payable as follows:

1. $150.00 per month to Flora M. Sherman;
2. $150.00 per month to Filena T. Hyde;
3. The residue in equal shares to Elsie Sherman Alco and Frederic R. Sherman.

That on or about the 11th day of February, 1927, Frederic R. Sherman transferred, conveyed, set over and assigned to Edna Smart Sherman, your petitioner, one-half of all of his right, title and interest in and to said trust; that a copy of said assignment is attached hereto, marked Exhibit "C", and made a part hereof as if herein fully set out;

(3) That prior to the 1st day of January, 1929, Leander S. Sherman and Katie Sherman, his wife, did die, and at all times during the calendar year 1929 Flora M. Sherman, Filena T. Hyde, Elsie Sherman Alco, Frederic R. Sherman and Edna Smart Sherman were living and, as hereinabove set forth, were entitled under and pursuant to the terms of the aforesaid declaration of trust to share in the income of said trust, after deducting any expenses incurred by the Trustees thereof in connection with the administration of said trust, in the manner following, to-wit:

1. Flora M. Sherman, $150.00 per month;
2. Filena T. Hyde, $150.00 per month;
3. The remainder of said income as follows:
   (a) To Elsie Sherman Alco, one-half;
   (b) To Frederic R. Sherman, one-quarter;
   (c) To Edna Smart Sherman, the petitioner, one-quarter. **[4]**

(4) That the income of said trust for the year 1929 was as follows:

Interest	$ 99.73
Dividends	$54,088.00
Total	$54,187.73

That the expenditures of said income of said trust were as follows:

To Jane Porter McCann	$ 5,000.00
Sundry expense	$ 13.30
Total	$ 5,013.30

(5) That the income of said trust distributable to the beneficiaries thereof, under and pursuant to the aforesaid indenture of trust, for the year 1929 was and is $49,174.43; that your petitioner's distributable share of said sum and the amount actually distributed to said petitioner was and is $11,393.61; that the Commissioner of Internal Revenue did determine, as set forth in said Notice of Deficiency attached hereto and marked Exhibit "A", that the said taxable share of said trust to your petitioner was the sum of $12,643.60;

(6) That the sum of $5,000.00 paid to Jane Porter McCann was in partial settlement of a claim made by said Jane Porter McCann in an action filed in the Superior Court of the State of California, in and for the City and County of San Francisco, seeking to obtain a portion of the trust property.

(B) With reference to the error hereinabove in subdivision (b) of paragraph IV set forth, the petitioner alleges:

(1) That petitioner and Frederic R. Sherman are, and at all times during the taxable year 1929 [5] were, husband and wife; that each of them resided in the State of California during said year; that on or about the 12th day of May, 1926, petitioner and said Frederic R. Sherman did separate and thereupon by instruments dated May 12, 1926 and February 11, 1927, respectively, did make and enter into a separation agreement, wherein and whereby they did define and determine their rights and interest in and to all of the property of the husband, Frederic R. Sherman, both community and separate; that it was the intention of the petitioner and said Frederic R. Sherman, by said agreement, to terminate the community interest of the petitioner in and to any part of the earnings of said Frederic R. Sherman which he might thereafter have; that petitioner and said Frederic R. Sherman have lived separate and apart ever since said 12th day of May, 1926; that other than the sum of $3,000.00 petitioner received no moneys or other property of any character or description from said Frederic R. Sherman during the taxable year 1929; that copies of the aforesaid agreements dated May 12, 1926 and February 11, 1927, respectively, are attached hereto and marked Exhibits "D" and "E", respectively, and made a part hereof as if herein fully set forth.

WHEREFORE, your petitioner prays that this Board may hear the proceedings and determine:

(a) That the income of said Leander S. Sherman Trust for the year 1929 taxable to

your petitioner is the sum distributed to her, to-wit, the sum of $11,393.61, instead of the sum of $12,643.60 fixed by the Commissioner of Internal Revenue as the share of said income taxable to your petitioner; and

(b) That no part of the earnings of said Frederic [6] R. Sherman for the year 1929 is taxable to your petitioner.

EDNA SMART SHERMAN
Petitioner.

State of California,
City and County of San Francisco.—ss.

EDNA SMART SHERMAN, being first duly sworn, deposes and says:

That she is the petitioner above named; that she has read said petition and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated on information and belief and as to those facts she believes them to be true.

EDNA SMART SHERMAN

Subscribed and sworn to before me this 30th day of April, 1932.

[Seal] VIOLET NEUNBURG
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 31, 1934 [7]

EXHIBIT "A"

NP-2-28

TREASURY DEPARTMENT
Washington

March 7, 1932

Office of
COMMISSIONER OF INTERNAL
REVENUE

Mrs. Edna Smart Sherman,
285 Jayne Street,
Oakland, California.

Madam:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $7,243.90, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P:-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of

interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [8]

(Exhibit "A")

STATEMENT

IT:AR:E-1
AAT-60D

In re: Mrs. Edna Smart Sherman,
285 Jayne Street,
Oakland, California.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$8,136.20	$892.30	$7,243.90

The deficiency shown herein is based upon the report dated October 15, 1931 prepared by Revenue Auditor F. M. Ford and transmitted to you under date of February 2, 1932, which report is made a part of this letter.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency. [9]

(Exhibit "A")

TREASURY DEPARTMENT
Internal Revenue Service
461 Market Street
San Francisco, California
Office of
INTERNAL REVENUE
AGENT IN CHARGE

In re: Income Tax

Date of report: Feb. 2, 1932

Recommendation:

Years	Additional Tax	Overassessment	Penalties
1929	$7,243.90		
	Total		

Edna Smart Sherman
285 Jayne Street
Oakland, California

The recommendations which this office proposes to make with respect to your income tax liability as the result of a recent examination by an internal

revenue agent are shown in the statement attached.

If you acquiesce in the proposed tax liability the inclosed Form 870 should be executed and forwarded to this office. Your consent on Form 870 to the prompt assessment of any deficiency indicated will stop the running of interest to be assessed on such deficiency under the provisions of section 283(d) of the Revenue Act of 1926 or section 292 of the Revenue Act of 1928, upon a date not later than thirty days after the filing of Form 870 properly executed. Unless such consent is filed the interest to be assessed under the law upon any deficiency indicated runs to the date the deficiency is assessed and the assessment may be made only as provided by section 274(a) of the Revenue Act of 1926 and/or Section 272(a) of the Revenue Act of 1928.

Should you desire to make immediate payment without awaiting formal assessment and notice and demand, you should communicate with the collector of internal revenue at Custom House, San Francisco, inclosing this letter, or a copy thereof. If payment is so made the interest period will terminate on the date of payment.

If you do not acquiesce in the proposed recommendations you should file a protest in writing with this office. Any protest so filed will be given careful consideration, and, if you so desire, you will be given an opportunity for a hearing before the recommendations are forwarded to Washington.

Arrangements will be made by this office upon your request [101] to answer any questions which

may occur to you in your review of these recommendations.

In any event please sign the inclosed form acknowledging receipt of this letter and related papers and return such form to this office.

Respectfully,

B. W. WILDE, JR.,

Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments

Form 870

Form of acknowledgment. [11]

(Exhibit "A")

Name Edna Smart Sherman

STATEMENT OF TOTAL TAX LIABILITY

Year	Tax Previously Assessed	Adjustments Proposed in Accompanying Report		Correct Tax Liability
		Deficiency	Overassessment	
1929	$892.30	$7,243.90		$8,136.20

NOTE

The amount shown in the first column of the above statement is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Year 19

Original tax .....

Deficiency assessed,....., 19....., ...

or

Overassessment scheduled....., 19....., ...

Net tax previously assessed .....

Year 19 [12]

(Exhibit "A")

—2—

Edna Smart Sherman

F. M. Ford

Examining Officer

Table of Contents

Preliminary Statement

The deficiency is the result of three major adjustments the transfer of one half of the husband's salary from his return as community income in accordance with I. T. 3859, based on the Malcolm Decision of the U. S. Supreme Court, the inclusion of profit on the redemption of Dairy Dale "A" stock, and the revision of profit reported on the sale of Borden stock received in exchange for Dairy

Dale "B" stock. These adjustments are partly offset by the elimination for normal tax of dividends received through the trust, and by allowance of exemption to the taxpayer as the head of a household.

Earned income credit has been computed in accordance with I. T. 3879, following the McLarry Decision of the U. S. Circuit Court of Appeals.

The changes have been discussed with the taxpayer and her attorney Mr. Turner, of Sloss and Turner. The changes in profits on securities are conceded but it is expected that the inclusion of one half of the husband's salary will be protested. [13]

(Exhibit "A")

—3—

Name Edna Smart Sherman

Schedule No. I

BLOCK ADJUSTMENTS

	Return	Additions to income	Deductions From income	Corrected
1 Salary community	— (1)	11,250.00		11,250.00
2				
3 Interest	762.39			762.38
Interest on bonds 4 tax-free covenant	1,602.50			1,602.50
5				
Leander S. Sherman 6 Trust	12,425.00 (2)	218.60	(4) 12,643.60	
7				
8 Profit on sales	2,262.08		(3) 1,576.75	685.33
8a Capital gain		(3) 51,631.70		51,631.70
9 Dividends	11,924.38	(4) 12,643.60		24,567.98
10				
11 Misc.	300.00			300.00
12 Total income	29,276.35			90,799.90 92,049.90
13 Interest paid	347.21			347.21
14 Taxes paid	428.58			428.58
15				
16				
17 Contributions	399.00			399.00
18 Other deductions	1,398.75	(5) 1,250.00		148.75
Total deductions	2,573.54			1,323.54
Net income	26,702.81	76,993.90	14,220.35	89,476.36
TOTAL INCOME				

Wife's net gain or loss $.....

Husband's net income or loss $.....

Edna Smart Sherman

SCHEDULE I(a)

Explanation of Changes

(1) Salary —

One half of the salary of the husband, Frederic Royal Sherman has been transferred as community income to the return of his wife, in accordance with I.T. 3857, based on the Malcolm Decision of the U. S. Supreme Court.

The relevant court decisions hold that under the California statutes separation of husband and wife does not offset the status of community property. Even during the pending of an interlocutory decree of divorce the parties are still husband and wife, and if one dies, the survivor has the same rights as if no interlocutory decree had been issued. (Estate of Seiler, 164 Cal. 181, 128 Pac. 334 and Olson vs. Superior Court, 175 Cal. 250, 165 Pac. 706).

In the case of Brown v. Brown, 170 Cal. 1, 147 Pac. 1168, it was said—"As we have seen, the marriage status remains until the final decree."

Reason by analogy, it is deemed that a separation of husband and wife, without property agreements, does not affect the liability of the wife for taxation on one half of her husband's earned income subsequent to 7/29/27.

Salary received by (Frederic Royal Sherman in 1929		22,500.00
Taxable		
Frederick Royal Sherman	11,250.00	
Edna Smart Sherman	11,250.00	
(2) Fiduciary income		
Total distributable income—Form 1041		49,174.43
Add—unallowable deduction on line (15) (compromise settlement chargeable against corpus)		5,000.00
Corrected income		54,174.43
Less specific *re*quests		3,600.00
		50,574.43
Distributable interests		
25% Frederick Royal Sherman	12,643.60	
25% Edna Smart Sherman	12,643.60	

[15]

(Exhibit "A")

—5—

Edna Smart Sherman

SCHEDULE I(a)

Explanation of Changes

(3) Schedule D—(Capital net gain on securities held over two years) The Dairy Dale "A" and "B" stock was acquired on June 30, 1927. Exchange for Borden was affected August 1, 1929.

Total profit on sales of securities		52,317.03
Less profit on Borden and Dairy Dale A		51,631.70
Remainder—Schedule C		$ 685.33
Capital gain—Schedule D	51,631.70	
Tax at 12½%	6,453.96	

Profit on Borden and Dairy Dale has been computed in Exhibit A.

(4) Dividends

Income from trust		12,643.61
Dividends 25% of 54,088.00	13,522.00	
Other increase 25% of 86.40	21.60	
	13,543.60	
Less specific bequest ¼ (3600)	900.00	
(Dividends)	12,643.60	

(5) The payment to John and Jane McCann in settlement of claim against the trust estate is deemed to be chargeable against the corpus of the estate rather than against the income of the beneficiaries. [16]

—6—

Name of Taxpayer Edna Smart Sherman
Year)
Schedule No. II Period) ended 1929

COMPUTATION OF TAX

Net income (from Schedule I)		$89,476.36
Less: Net loss (section 117 of 1928 Act) Capital net gain	$51,631.70	51,631.70
Income subject to surtax		$37,844.66
Less: Dividends	$24,567.98	
Interest on Liberty Bonds, etc.		
Personal exemption and credit for dependents	3,900.00	28,476.98
Balance subject to normal tax		$ 9,367.68
Normal tax at ½ on $ 4,000	20.00	
Normal tax at 2 on $ 4,000	80.00	
Normal tax at 4 on $ 1,367.68	54.70	
Surtax on $37,844.66	1,584.47	
Tax at 12½% on capital net gain of $51,631.70	6,453.96	8,193.13

Fiscal year income from partnerships, etc.:		
Normal tax at on $		
Normal tax at on $		
Normal tax at on $		
Surtax on $		
Total tax		$ 8,193.13
Less: Credit for earned net income (from Schedule III)	$ 24.88	
Income tax paid at source	32.05	
Taxes paid to a foreign country		56.93
Total tax assessable		$ 8,136.20
Tax previously assessed		892.30
Additional tax to be assessed		$ 7,243.90

[17]

—7—

Name of taxpayer Edna Smart Sherman

Schedule No. III

COMPUTATION OF EARNED INCOME CREDIT—1924 AND SUBSEQUENT YEARS

Year)
Period) ended 1929

INCOME TAX

Earned net income (not over $10.000 for 1924, $20.000 for 1925, 1926 and 1927, or $30.000 thereafter)		$11.250.00
Less personal exemption and credit for dependents		3.900.00
Balance		$ 7.350.00
Normal tax at 1½% on $ 4.000	$20.00	
Normal tax at 2% on $3.350.00	67.00	
Normal tax at ....% on $.....	.....	
Surtax on $11.250.00	12.50	
Total tax		$ 99.50
Credit of 25 per cent (not over 25 per cent of normal tax on net income for 1924, or not over 25 per cent of normal tax on net income plus 25 per cent of surtax on earned net income for 1925 and subsequent years		$ 24.88

Edna Smart Sherman

EXHIBIT A

Borden Co. Sales

Dairy Dale (received in exchange for Dairy Delivery)

			Cost	Cost
1927 "A"		729.00		4,241.85
"B"	7,604.17		22,123.81	
1928 sold	1,250.00		3,636.75	
Balances		729.00 "A"		4,241.85
1/1/29	6,354.17 "B"		18,487.06	

Exchanged 8/1/29 for Borden on the basis of 3¾ shares Dairy Dale "B" for one share Borden, and with all Dairy Dale A redeemed at 30.00 a share.

Sales	Sale price	Profit
729 shares Dairy Dale A at $30	$21,870.00	
Cost	4,241.85	
Profit on redemption		17,628.15
Borden—		
110 shares	10,228.75	
200 "	19,348.00	
100 "	8,900.00	
	38,476.75	

Cost—1 sh. Dairy Dale "B"	2.9094		
" 1 sh. Bordens 3¾ Dairy Dale "B"	10.91025		
Cost 410 shares Borden at 70.91025		4,473.20	34,003.55
Total profit on sales of Borden and Dairy Dale "A"			51,631.70
Profit reported Borden			
110 shares	328.75		
200 shares	1,348.00		
100 shares	(100.00)		
	1,576.75		
Corrected	51,631.70		
Increase		50,054.93	
Total profit reported		2,262.08	
Corrected profit from sales		52,317.03	

[19]

EXHIBIT "B"

CONVEYANCE AND DECLARATION OF TRUST

We, LEANDER S. SHERMAN and KATIE SHERMAN, his wife, of the City and County of San Francisco, State of California, do hereby convey, assign, transfer and set over unto FREDERIC R. SHERMAN, PHILLIP T. CLAY, KATIE SHERMAN and LEANDER S. SHERMAN, all of the capital stock of the Sherman Investment Company, a corporation, owned by us, or either of us, in trust, however, for the following uses and purposes:

To manage and control said capital stock and out of the income therefrom, after deducting any expense incurred by them in connection with the administration of said trust, to pay in monthly payments to Leander S. Sherman during his lifetime the whole of said net income, and upon his death to pay one-half of said net income in monthly payments to Katie Sherman, during her lifetime, and during the life of Katie Sherman, out of the remaining one-half of said income, and after her death, out of the whole thereof, to pay to Filena T. Hyde and Flora M. Sherman, the sum of One Hundred and Fifty Dollars ($150.00) a month each, during their respective lives, the balance of said remaining one-half of said income during the life of Katie Sherman, after deducting said payments to Filena T. Hyde and Flora M. Sherman, and the whole thereof, upon their death, shall be paid by

said trustees in monthly payments to Katie Sherman, Elsie Sherman Alco and Frederic R. Sherman, share and share alike.

Upon the death of said Katie Sherman, the income from said capital stock, after deducting said payments to Filena T. Hyde [20] and Flora M. Sherman, and the whole thereof, upon their death, shall be paid by said Trustees to Elsie Sherman Alco and Frederic R. Sherman, share and share alike.

If either of said last named persons, to-wit: Elsie Sherman Alco and Frederic R. Sherman should die leaving lawful issue, or lawful issue of such issue, then the share of said income of such person dying shall be paid in equal shares to the lawful issue of said decedent and to the lawful issue of any deceased child or children by right of representation. If either of said persons should die without leaving lawful issue or lawful issue of such issue, the income from said capital stock, after deducting said payments to Filena T. Hyde and Flora M. Sherman shall be paid to the survivor, or if the one so dying without leaving lawful issue, or lawful issue of such issue, is the survivor, said income shall be paid to the lawful issue and the lawful issue of any deceased child or children of the other of said persons by right of representation.

The Trust hereby created shall continue until the death of the survivor of said Filena T. Hyde, Flora M. Sherman, Katie Sherman, Elsie Sherman Alco and Frederic R. Sherman. Upon the death of the survivor of them, said capital stock shall go to and

vest in the lawful issue and the lawful issue of any deceased child or children then living of said Elsie Sherman Alco and Frederic R. Sherman, in the manner following: the lawful issue, and the lawful issue of any deceased child or children of each of said beneficiaries, Elsie Sherman Alco and Frederic R. Sherman, then living, shall constitute a class and said capital stock shall be divided into as many equal portions as there are such classes, and each portion of said capital [21] stock shall go to and vest in equal shares in the lawful issue and the lawful issue of any deceased child or children of said beneficiaries by right of representation in each class, respectively.

Said trustees, or the survivors of them, shall have the power and authority to appoint a successor to any trustee when a vacancy occurs by resignation, death or otherwise.

Upon the termination of this trust, the trustees, their survivors and successors, shall cause said capital stock to be divided in the shares or proportions herein provided, and shall deliver to the parties entitled to the same under the provisions of this trust certificates evidencing the number of shares of capital stock to which each person is so entitled.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 1st day of September, 1921.

LEANDER S. SHERMAN
KATIE SHERMAN

State of California,
City and County of San Francisco.—ss.

On this 1st day of September in the year One Thousand Nine Hundred and twenty-one before me, MARIE FORMAN, a Notary Public in and for said City and County residing therein, duly commissioned and sworn, personally appeared LEANDER S. SHERMAN and KATIE SHERMAN, his wife, known to me to be the persons described in, *t*hose names are subscribed to, and who executed the within annexed instrument, and they acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my Office, in the said City and County of San Francisco, the day and year above written.

[Seal] MARIE FORMAN
Notary Public in and for the City and County of San Francisco, State of California. [22]

EXHIBIT "C"

KNOW ALL MEN BY THESE PRESENTS, That I, FREDERIC R. SHERMAN, have assigned, transferred, set over and conveyed, and do by these presents assign, transfer, set over and convey to EDNA FRANCES SHERMAN an undivided one-half (½) of all my right, title, interest, claim and demand in and to that certain trust created by

Leander S. Sherman and Katie Sherman, his wife, dated September 1st, 1921.

DATED, San Francisco, February 11th, 1927.

F. R. SHERMAN [23]

EXHIBIT "D"

THIS AGREEMENT made and entered into this 12th day of May, 1926, by and between FREDERIC R. SHERMAN, party of the first part, and EDNA FRANCES SHERMAN, party of the second part,

WITNESSETH: Whereas the parties hereto are husband and wife, and have three minor children, namely, Mary Frances Sherman, Edna Sherman and Clay Sherman; and

WHEREAS the party of the first part desires to insure the future support and maintenance of his said wife and children;

NOW THEREFORE, said party of the first part, in consideration of the sum of One ($1.00) Dollar in hand paid, the receipt of which is hereby acknowledged, and of the love and affection which he has for his said family, and for the purpose of insuring their future support and maintenance, undertakes and agrees as follows:

Said first party agrees to and he does hereby transfer and convey to said second party the following described parcels of real property situated in the City of Oakland, County of Alameda, State of California, to-wit:

Parcel 1: COMMENCING at a point on the northern line of Jayne Avenue distant thereon three hundred ten and 24/100 (310.24) feet easterly from the point of intersection thereof with the eastern line of Lee Street; running thence easterly along said line of Jayne Avenue seventy (70) feet; thence at right angles northerly one hundred and twenty-five (125) feet; thence at right angles westerly seventy (70) feet and thence at right angles southerly one hundred and twenty-five (125) feet to the point of commencement.

Being the eastern 35 feet of Lot No. 20 and the western 35 feet of Lot No. 21 in Block No. 5 as laid down and delineated upon a certain map entitled "Subdivision No. 1 of Adams Point Property Oakland California 1897" filed January 12, 1898, in the office of the Recorder of Alameda County.

Parcel 2: Lot numbered thirty-three (33) as said lot is delineated and so designated upon that certain map entitled [24] "Map of Subdivision Sequoyah Hills Oakland California" as the same appears upon said map which is recorded in the Recorder's office of said County, in Book 28 of Maps, at pages 63 and 64.

Said first party agrees that he will assign, transfer and convey to said second party, and he does hereby assign, transfer and convey to her all furniture and furnishings, and all other personal prop-

erty of every kind and description now located at the home of said parties, No. 285 Jayne Avenue, Oakland, California, the same being located on the property described above as Parcel 1.

Said first party further agrees to assign, transfer and convey, and does hereby assign, transfer and convey to said second party that certain Buick sedan, Motor No. 1301087, 1925 model, now registered in the name of said first party.

Said first party further agrees that he will pay to said second party the sum of One Thousand ($1000.00) Dollars per month for the support and maintenance of said second party and said minor children, beginning on the 1st day of June, 1926.

Said first party further agrees that he will transfer, assign and convey and he does hereby assign, transfer and convey to P. T. Clay, F. W. Stephenson and R. H. Cross all his right, title, interest, claim and demand of every kind and character in and to the estate of his father, Leander S. Sherman, now in the course of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, in trust, however, to receive and collect the same and to invest and reinvest the same and to pay the income [25] therefrom to said first party during his lifetime and upon his death to convey to said Mary Frances Sherman, Edna Sherman and Clay Sherman said trust estate.

Said first party further agrees that he will as-

sign, transfer and convey to P. T. Clay, F. W. Stephenson and R. H. Cross all his right, title, interest, claim and demand in and to that certain trust created by Leander S. Sherman and Katie Sherman, his wife, dated September 1st, 1921, the same to be held by said transferees in trust for the same purposes and under the same conditions as the interest of said first party in the estate of said Leander S. Sherman, deceased, heretofore referred to.

Said first party agrees to make, execute, acknowledge and deliver to said second party any and all instruments or documents which may be necessary or requested by said second party to fully carry into effect each and all of the terms and provisions hereof.

Said first party agrees to pay as due, and to deliver to second party receipts therefor, the premiums on the life insurance policies this day assigned to said second party.

In event said second party should re-marry, said monthly payment of $1000.00 shall be reduced to an amount which in the opinion of said second party would be sufficient and adequate for the support, maintenance, education and care of the children of the parties hereto.

IN WITNESS WHEREOF said parties have hereunto set their hands and seals this 12th day of May, 1926.

FREDERIC R. SHERMAN
EDNA FRANCES SHERMAN [26]

EXHIBIT "E"

THIS AGREEMENT, made and entered into the 11th day of February, 1927, by and between FREDERIC R. SHERMAN, party of the first part, and EDNA FRANCES SHERMAN, party of the second part.

WITNESSETH:

WHEREAS the parties hereto did on the 12th day of May, 1926, make and enter into an agreement of that date with reference to the proper future support and maintenance by said first party of said second party and the children of said parties; and

WHEREAS in and by that agreement it is provided as follows:

> "Said first party further agrees that he will transfer, assign and convey and he does hereby assign, transfer and convey to P. T. Clay, F. W. Stephenson and R. H. Cross all his right, title, interest, claim and demand of every kind and character in and to the estate of his father, Leander S. Sherman, now in the course of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, in trust, however, to receive and collect the same and to invest and reinvest the same and to pay the income therefrom to said first party during his lifetime and upon his death to convey to said Mary Frances Sherman, Edna Sherman and Clay Sherman said trust estate.

"Said first party agrees that he will assign, transfer and convey to P. T. Clay, F. W. Stephenson and R. H. Cross all his right, title, interest, claim and demand in and to that certain trust created by Leander S. Sherman and Katie Sherman, his wife, dated September 1st, 1921, the same to be held by said transferees in trust for the same purposes and under the same conditions as the interest of said first party in the estate of said Leander S. Sherman, deceased, heretofore referred to;"

and

WHEREAS the provisions of said paragraphs of said agreement of May 12, 1926, were never carried out or performed [27] by said first party, and whereas the parties hereto desire to change and modify that portion of said agreement, and

WHEREAS on or about the 12th day of May, 1926, said first party assigned and transferred to said second party several certain life and other insurance policies,

NOW THEREFORE, in lieu of the provisions of said paragraphs of said agreement above set forth, the parties hereto agree as follows:

Said first party agrees that he will assign, transfer and convey to said second party, Edna Frances Sherman, an undivided one-half (½) of all his right, title, interest, claim and demand in and to that certain trust created by Leander S. Sherman and Katie Sherman, his wife, dated September 1st, 1921, and will also assign, transfer and convey to

said second party an undivided one-half (½) of all his right, title, interest, claim and demand of every kind and character in and to the estate of his father, Leander S. Sherman, now in the course of administration in the Superior Court of the State of California, in and for the City and County of San Francisco.

It is further agreed that said first party shall have and receive all benefits derived or to be derived from or under said policies on account of accident, sick or disability provisions, and that upon the maturity of any of said policies which are an endowment policy the principal thereof shall be received and held by said second party in trust to invest the principal thereof to earn at least six per cent, and reinvest the same as may be deemed by her necessary, and to pay the whole income therefrom to said first party during his lifetime, [28] and upon his death said trust shall terminate and the principal pass free and clear thereof to said second party.

Except as herein modified, said agreement of May 12th, 1926, between the parties hereto shall remain in full force and effect.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

F. R. SHERMAN
EDNA FRANCES SHERMAN

[Endorsed]: United States Board of Tax Appeals. Filed May 4, 1934. [29]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above named petitioner, admits and denies as follows:

I. Admits the allegation contained in Paragraph I of the petition.

II. Admits the allegation contained in Paragraph II of the petition.

III. Admits the allegation contained in Paragraph III of the petition.

IV (a) and (b). Denies error in the action recited in Paragraph IV(a) and (b) of the petition.

V(A) and (B). Denies each and every allegation of fact contained in Paragraph V(A) and (B) of the petition which is inconsistent with and contrary to the determination of the Commissioner as stated in the notice of final determination of deficiency dated March 7, 1932.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

MAXWELL M. MAHANY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Received Jun 7, 1932.

[Endorsed]: United States Board of Tax Appeals. Filed Jun 7, 1932. [30]

[Title of Court and Cause.]

Docket No. 65593. Promulgated December 21, 1933.

An agreement which merely provides for the transfer of property from one spouse to the other upon separation does not destroy the marital community composed of the parties thereto.

E. D. Turner, Esq., for the petitioner.

E. A. Tonjes, Esq., for the respondent.

OPINION.

LANSDON: The respondent has determined a deficiency in income tax for the year 1929 in the amount of $7,243.90. The issues pleaded by the petitioner are (1) that the respondent erred in computing her income from a certain trust in the taxable year, and (2) in determining that one half the salary of her husband is taxable to her. In his brief counsel for petitioner abandons the first issue. The parties have filed a stipulation which the Board has accepted and from which the material facts are summarized as follows:

> The petitioner is, and for a long time prior to the taxable year, was the wife of Frederick Royal Sherman. Husband and wife are residents of San Francisco, California, but since

some time in 1926 have lived separately. On May 12, 1926, they entered into an agreement in which the husband agreed to transfer all his rights, title, and interest in certain real and personal property to the petitioner. The instrument evidencing such agreement specifies and describes all the assets to be transferred. It makes no mention of community property or community interests. In it there is no mention of income or of the right to receive income. This agreement was subsequently somewhat amended but the changes are not material to the issues here. In the taxable year the husband received a salary of $22,500 and in his Federal income tax return included the whole amount thereof in his gross income. Upon audit the respondent determined that one half the husband's salary, or $11,250, should be taxed to the wife and determined a refund in the amount of $1,007.13. In her return for 1929 the petitioner reported no part of her husband's salary as income. Upon audit of such return the respondent added the amount of $11,250 representing one half the husband's salary for the taxable year to petitioner's gross income, made other adjustments not now material here, and determined the deficiency under review.

The petitioner contends that the agreement of May 12, 1926, broke the community relationship which had theretofore existed between [31] herself

and her husband and that thereafter all income earned or otherwise received by either was separate property. To maintain this position her counsel argues that in California a husband and wife may enter into binding contracts with each other. This may be admitted without in anywise deciding or affecting the issue here. The contract in evidence does not specify that it is a full property settlement. After the transfers therein proposed were made there may have been left a considerable amount of community property. It contains no provisions that indicate the termination of the marital community. In it the wife nowhere waives her right to her vested interest in the salary of her husband under the laws of California as specifically set out in the Civil Code of California, 1931, at section 161 (a).[1] In United States v. Malcolm, 282 U. S. 792, the Supreme Court held that under such section the wife has an interest in community income which should be separately reported for income taxation.

Unless the agreement of May 12, 1926, destroyed the community, it is obvious that the respondent

---

[1]Section 161. (a) *Interests in community property.* The respective interests of the husband and wife in community property during continuance of the marriage relations are present, existing and equal interests under the management and control of the husband as is provided in section 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

must prevail here. If it was intended to be a waiver of the wife's right to a vested interest in community income, it must be held that it is ineffective for that purpose, since the Supreme Court has held, in Lucas v. Earl, 281 U. S. 111, that no anticipatory arrangement can be effective to shift tax liabilities in respect of community income. In the absence of any divorce petitioner and her husband constituted a marital community under the laws of California in 1929. If an interlocutory decree of divorce has been granted in California, the parties are still husband and wife until such decree becomes final, and if in the interim one dies the survivor has the same rights as if no such decree had been issued. Estate of Leiter, 164 Cal. 181; 128 Pac. 334; Olson v. Superior Court, 175 Cal. 250; 165 Pac. 706; Brown v. Brown, 170 Cal. 1; 147 Pac. 1168.

Since the agreement is not a waiver of community rights and the marital community in question survived through the taxable year, the determination of the respondent must be affirmed.

Decision will be entered for the respondent.

[Seal] [32]

United States Board of Tax Appeals
Washington

Docket No. 65593.

MRS. EDNA SMART SHERMAN,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated December 21, 1933, it is

ORDERED and DECIDED: That there is a deficiency of $7,243.90 for the year 1929.

[Seal] (Signed) W. C. LANSDON
Member.

[Endorsed]: Entered Dec. 28, 1933. [33]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS

EDNA SMART SHERMAN, in support of this her petition, filed in pursuance of the provisions of Section 1001 of the Act of Congress entitled the Revenue Act of 1926, as amended by Section 1101 of the Act of Congress entitled the Revenue Act of 1932, for the review of the decision of the United States Board of Tax Appeals promulgated Decem-

ber 21, 1933 and entered December 28, 1933, approving a deficiency in income tax of the appellant for the calendar year 1929, in the amount of $7,243.90, represents as follows:

I.

Nature of the Controversy

(1) On May 4, 1932, the appellant filed with the United States Board of Tax Appeals her petition requesting the redetermination of a deficiency in income tax for the calendar year 1929 [34] amounting to $7,243.90, as shown by the final notice of deficiency mailed by the appellee under date of March 7, 1932. The petition alleged that the determination of tax set forth in the notice of deficiency was based upon the following errors:

> (a) That the Commissioner erred in determining the income of the petitioner for the year 1929 from the Leander S. Sherman Trust;
>
> (b) That the Commissioner erred in determining that one-half of the salary of the husband of the petitioner Frederic R. Sherman was taxable to the petitioner;

and set forth the facts upon which the petitioner relied, which were that the petitioner and Frederic R. Sherman were, and at all times during the taxable year 1929 had been, husband and wife; that each of them resided in the State of California during said year; that on or about the 12th day of May, 1926, petitioner and said Frederic R. Sherman did separate and thereupon, by instruments dated May 12, 1926 and February 11, 1927, respectively,

did make and enter into a separation agreement, wherein and whereby they did define and determine their rights and interest in and to all of the property of the husband, Frederic R. Sherman, both community and separate; that it was the intention of the petitioner and said Frederic R. Sherman, by said agreement, to terminate the community interest of the petitioner in and to any part of the earnings of said Frederic R. Sherman which he might thereafter have; that petitioner and said Frederic R. Sherman have lived separate and apart ever since said 12th day of May, 1926; that other than the sum of $3,000.00 petitioner received no moneys or other property of any character or description from said Frederic R. Sherman during the taxable year 1929. [35]

(2) Thereafter the respondent filed with the said Board its answer to the said petition denying all of the material allegations of the petition except the identity and residence of the petitioner, the correctness of the notice of deficiency, its date of mailing and the nature and amount of the taxes in controversy, and the cause being at issue duly came on for hearing on September 29, 1933, in the City and County of San Francisco, State of California.

(3) That upon said hearing the petitioner abandoned the first ground of error assigned and relied solely upon the second assignment with respect to the inclusion of the one-half of her husband's salary in her taxable income, and the petitioner therein, Edna Smart Sherman, and the respondent therein, the Commissioner of Internal Revenue, entered into

a written stipulation which was accepted by said Board and filed with the Clerk thereof. That a copy of said stipulation is attached hereto and marked Exhibit "A".

That in addition, at the time of said hearing before the Board of Tax Appeals petitioner, being duly sworn as a witness, testified that it was the intention of petitioner and her husband in entering into their separation agreement to make a complete division of their property rights, terminating their community interest in any property then in existence and in the earnings and salaries of Frederic R. Sherman thereafter accruing; that it was orally stipulated at that time by counsel for the petitioner and respondent, respectively, that Frederic R. Sherman, the husband of the petitioner, would if placed upon the stand give similar testimony. The Board granted petitioner's request to file a brief and ordered that the respondent and petitioner file their briefs simultaneously by November 20, 1933; that on November 20, 1933, [36] petitioner filed said brief with the United States Board of Tax Appeals. On December 28, 1933, the said Board entered its final order of redetermination, approving the deficiency as determined by the respondent in the amount of $7,243.90 for the year 1929, declaring that husband and wife could not, as a matter of law, by contract sever their community interest in the husband's future earnings so as to eliminate the wife's liability for a tax on one-half thereof.

II.

Designation of Court of Review

The petitioner is an inhabitant and resident of the State of California, residing therein at 285 Jayne Street, in the City of Oakland, and being aggrieved by the aforesaid decision and order of the Board desires that the same be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

III.

Assignment of Error

The petitioner, as a basis for review, makes the following assignment of error which she intends to argue:

1. That the Commissioner erred in determining that one-half of the salary of the husband of the petitioner Frederic R. Sherman for the year 1929 was taxable to the petitioner.

WHEREFORE, your petitioner prays that this Honorable Court may review said decision, opinion and order, and reverse and set aside the same, and that the Clerk of the said United States Board of Tax Appeals be directed to prepare, transmit and deliver to the Clerk of said court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the [37] rules of said court and statutes made and provided.

And your petitioner will ever pray.

EDNA SMART SHERMAN,
Petitioner.

E. D. TURNER, JR.,
Attorney for Petitioner.

State of California,
City and County of San Francisco—ss.

Edna Smart Sherman, being first duly sworn, deposes and says:

That she is the petitioner named in the foregoing petition; that she has read said petition and knows the content thereof and that the same is true of her own knowledge.

EDNA SMART SHERMAN

Subscribed and sworn to before me this 15th day of March, 1934.

[Seal] VIOLET NEUENBURG,
Notary Public in and for the City and County of San Francisco, State of California. [38]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto:

(1) That the petitioner EDNA SMART SHERMAN is an individual residing at 285 Jayne Street, Oakland, California;

(2) That notice of deficiency (together with the Revenue Auditor's report made a part thereof), a copy of which is attached to the petition herein and marked Exhibit "A", was mailed to petitioner on the 7th day of March, 1932;

(3) That the taxes in controversy are income taxes for the year 1929;

(4) That the petitioner and Frederic R. Sherman are and at all times during the taxable year 1929 were husband and wife; that each of them resided in the State of California during said year; that on or about the 12th day of May, 1926, petitioner and said Frederic R. Sherman did separate and thereupon, by instruments dated May 12, 1926, and February 11, 1927, [39] respectively, did make and enter into certain agreements, copies of which are attached to the petition on file herein and marked, respectively, Exhibits "D" and "E"; that pursuant to said agreements said Frederic R. Sherman, on or about the 11th day of February, 1927, did convey and transfer to your petitioner the real and personal property therein referred to, including an undivided one-half interest in said Leander S. Sherman Trust and did thereafter pay to your petitioner the monthly compensation of One Thousand ($1,000) Dollars therein specified up to the calendar year 1929; that no stipulation is made with respect to the amount paid by said Frederic R. Sherman to your petitioner during the calendar year 1929, but evidence thereon may be submitted;

(5) That ever since said 12th day of May, 1926, petitioner and said Frederic R. Sherman have lived separate and apart; that Frederic R. Sherman for the calendar year 1929 reported the whole of his compensation and salary, in the sum of Twenty-Two Thousand Five Hundred ($22,500.) Dollars as his taxable income for said year, and paid a tax thereon; that on or about February 2, 1932, said Frederic R.

Sherman was advised by the Internal Revenue Agent in Charge that an investigation of his income tax liability for the year 1929 resulted in an over assessment in the sum of One Thousand Seven and 13/100 ($1,007.13) Dollars, and that the principal cause of said over-assessment was due to the elimination of Eleven Thousand Two Hundred and Fifty ($11,250.) Dollars, being one-half of the amount reported as his salary. [40]

IN WITNESS WHEREOF, the parties hereto have caused this stipulation to be made and entered into this 28 day of Sept., 1933.

E. D. TURNER, JR.
Counsel for Petitioner
E. A. TONJES
Counsel for Respondent [41]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE.

The above entitled cause came on for hearing before the Honorable W. C. Lansdon, member of the United States Board of Tax Appeals on the 29th day of September, 1933, there being present the petitioner, by her counsel E. D. Turner, Jr., and the respondent, by his counsel E. A. Tonjes.

I.

Prior to the introduction of testimony counsel for the petitioner presented a written stipulation signed by counsel for the respective parties, which

was accepted by the Board. Said stipulation stated:

(a) That the petitioner before the Board, Edna Smart Sherman, was an individual residing at 285 Jayne Street, Oakland, California;

(b) That notice of deficiency (together with the Revenue Auditor's report made a part thereof), a copy of which was attached [42] to the petition for hearing by the Board of Tax Appeals and marked Exhibit "A" thereof, was mailed to said petitioner on the 7th day of March, 1932;

(c) That the taxes in controversy were income taxes for the year 1929;

(d) That the said petitioner and Frederic R. Sherman were and at all times during the taxable year 1929 were husband and wife; that each of them resided in the State of California during said year; that on or about the 12th day of May, 1926, said petitioner and said Frederic R. Sherman did separate and thereupon, by instruments dated May 12, 1926, and February 11, 1927, respectively, did make and enter into certain agreements, copies of which were and are attached to the said petition for hearing before the Board of Tax Appeals and marked respectively, Exhibits "D" and "E" thereof (which exhibits are made a part of this statement by reference); that pursuant to said agreements said Frederic R. Sherman, on or about the 11th day of February, 1927, did convey and transfer to said petitioner the real and personal property therein referred to, including an undivided one-half interest in said Leander S. Sherman Trust and

did thereafter pay to said petitioner the monthly compensation of One Thousand ($1,000.00) Dollars therein specified up to the calendar year 1929;

(e) That no stipulation was made with respect to the amount paid by said Frederic R. Sherman to said petitioner during the calendar year 1929, but evidence thereon might be submitted;

(f) That ever since the 12th day of May, 1926, said petitioner and said Frederic R. Sherman have lived separate and apart; that Frederic R. Sherman for the calendar year 1929 reported the whole of his compensation and salary, in the sum of Twenty-Two [43] Thousand Five Hundred ($22,500.00) Dollars as his taxable income for said year, and paid a tax thereon; that on or about February 2, 1932, said Frederic R. Sherman was advised by the Internal Revenue Agent in charge that an investigation of his income tax liability for the year 1929 resulted in an over-assessment in the sum of One Thousand Seven and 13/100 ($1,007.13) Dollars, and that the principal cause of said over-assessment was due to the elimination of Eleven Thousand Two Hundred and Fifty ($11,250.00) Dollars, being one-half of the amount reported as his salary.

II.

In addition to filing the foregoing stipulation, said petitioner introduced the following testimony:

(a) Edna Smart Sherman, the petitioner before the Board, being first duly sworn, testified:

> That she received from her husband during the year 1929 $3,000.00. One thousand dollars

a month for each of the first three months of the year.

Counsel for the petitioner thereupon asked the following question:

"Q. Mrs. Sherman, when you entered into the contracts of May 12, 1926 and February 11, 1927, with your husband, F. R. Sherman, did you intend thereby to make a complete division of your property rights with Mr. Sherman, terminating your community interest in any property then existing and in his earnings and salary thereafter?"

The witness answered: "Yes, I did."

Counsel for the respondent thereupon objected to the question and moved that the answer be stricken from the record for the reason that the contracts themselves are the best evidence to show what was accomplished. [44]

The Member ruled as follows:

"I think you may ask the question. I don't think it can have any effect. We will interpret the contract according to its terms. We have no choice in that matter."

To that ruling the respondent noted an exception.

(b) It was stipulated orally by counsel for the respective parties that F. R. Sherman, the husband of said petitioner, if called as a witness, would give similar testimony with respect to his intention in executing the agreements of May 12, 1926 and February 11, 1927, as given by the petitioner, and

that the respondent would make the same objection to the question.

(c) Thereupon the respondent introduced in evidence the income tax return of the petitioner for the year 1929, and the income tax return of Frederic R. Sherman for the year, 1929, which were marked respectively, Respondent's Exhibits "A" and "B", and are attached hereto and made a part of this statement of evidence.

The foregoing is the substance of all the evidence adduced at the trial of said proceeding.

E. D. TURNER, JR.,
Attorney for the Appellant.
ROBERT H. JACKSON,
Attorney for Respondent.

The foregoing contains the substance of all evidence given at the hearing of this proceeding, and each of the exceptions stated to have been taken by the attorneys for the respective parties were so taken and were duly allowed and noted by the Board, and, in order that each and every one thereof may be preserved and made of record, this statement of the evidence is duly stated, approved and signed, and ordered to be made of record in the above entitled cause this 10 day of May, 1934.

(s) W. C. LANSDON,
Member [45]

EXHIBIT A.
(COPY)
TREASURY DEPARTMENT
Internal Revenue Service
San Francisco, Calif.
Office of the Collector
First District of California
March 14, 1930

Edna F. Sherman
285 Jayne Street
Oakland, California
Madam:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for calendar year 1929.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1930 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX SHOWN THEREON TO BE DUE, YOU are hereby granted an extension of time to May 15, 1930.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and

schedules shown on the form need not be filled in.

This letter, or a copy thereof, must be attached to both the tentative and completed returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "completed return."

Respectfully,

ROBT. H. LUCAS,

Commissioner.

By (signed) John P. McLaughlin,

GD Collector. [46]

Completed

Form 1040
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930

(Auditor's Stamp) JUL 1 1930 AUG 1 1930

Tax - - - $ 72 34 90
Penalty - - $
Interest - - $
Total $
Parent Co
Basis OA or RAR
Audited by
Unit No. 1 Date 3/27/30
LIST
Page Line

PRINT NAME AND ADDRESS PLAINLY BELOW

EDNA SMART SHERMAN
(Name)
285 Jayne Street
(Street and number, or rural route)
Oakland (Post office) Alameda (County) California (State)
Occupation

Do Not Write in These Spaces

File Code 1313

Serial Number

(Cashier's Stamp)

Cash - Check - M. O. - Cert. of Ind.
First Payment
$ 72 34 41
Credit
As 1 22 -

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1928, to what Collector's office was it sent? San Francisco
3. Is this a joint return of husband and wife? No.
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent: Frederic Royal Sherman, San Francisco
5. Were you married and living with husband or wife on the last day of your taxable year? No
6. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you? Yes
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. April 1, 1929
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year? one

Item and Instruction No.	INCOME	Amount received	Deductions paid (Explain in Schedule F)					
1.	Salaries, Wages, Commissions, etc. (State name and address of employer)	$	$	$				
2.	Income from Business or Profession. (From Schedule A)							
3.	Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)					762	39	
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source				1	602	50	
5.	Income from Partnerships. (State name and address)							
6.	Income from Fiduciaries. (State name and address) Leander S. Sherman Trust, 535 Mission Street, San Francisco				12	425	00	
7.	Rents and Royalties. (From Schedule B)							
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	X			2	262	08	
9.	Dividends on Stock of Domestic Corporations				11	924	38	
10.	Taxable Interest on Liberty Bonds, etc. (From Schedule E)							
11.	Other Income (including dividends on stock of foreign corporations). (State nature of income) (a) Northern California Building & Loan Association $600., $300. exempt					300	00	
	(b)							
12.	TOTAL INCOME IN ITEMS 1 TO 11						$ 29	276 35
	DEDUCTIONS							
13.	Interest Paid			$		347	21	
14.	Taxes Paid. (Explain in Schedule F)					428	58	
15.	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)							
16.	Bad Debts. (Explain in Schedule F)							
17.	Contributions. (Explain in Schedule F)					399	00	
18.	Other Deductions Authorized by Law. (Explain in Schedule F)				1	398	75	
19.	TOTAL DEDUCTIONS IN ITEMS 13 TO 18						$ 2	573 54
20.	NET INCOME (Item 12 minus Item 19)						$ 26	702 81

EARNED INCOME CREDIT

21. Earned Income (not over $30,000)	$ 5000	00
22. Less Personal Exemption and Credit for Dependents	1800	00
23. Balance (Item 21 minus 22)	$ 3200	00
24. Amount taxable at 1½% (not over $4,000)	$ 3200	00
25. Amount taxable at 2% (not over $4,000)		
26. Amount taxable at 3% (balance over $8,000 of Item 23)		
27. Normal Tax (1½% of Item 24)	$ 16	00
28. Normal Tax (2% of Item 25)		
29. Normal Tax (3% of Item 26)		
30. Surtax on Item 21		
31. Tax on Earned Net Income (total of Items 27 to 30)	$ 16	00
32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45, and 46)	$ 4	00

COMPUTATION OF TAX (See Instruction 28)

33. Net Income (Item 20 above)	$ 26702	81
34. Less: Dividends (Item 9)	$ 11924	38
35. Interest on Liberty Bonds, etc. (Item 10)		
36. Credit for Dependents	300	00
37. Personal Exemption	1500	00
38. Total of Items 34 to 37	$ 13724	38
39. Balance (Item 33 minus 38)	$ 12978	43
40. Amount taxable at 1½% (not over $4,000)	4000	00
41. Balance (Item 39 minus 40)	$ 8978	43
42. Amount taxable at 2% (not over $4,000)	4000	00
43. Amount taxable at 3% (Item 41 minus Item 42)	$ 4978	43

44. Normal Tax (1½% of Item 40)	$ 20	00
45. Normal Tax (2% of Item 42)	80	00
46. Normal Tax (3% of Item 43)	199	14
47. Surtax on Item 20 (see Instruction 23)	629	20
48. Tax on Net Income (total of Items 44 to 47)	$ 928	34
49. Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D)		
50. Total of or difference between Items 48 and 49	$ 928	34
51. Less Credit of 25% of Tax on Earned Income (Item 32)	4	00
52. Total Tax (Item 50 minus 51)	$ 924	34
53. Less Income Tax Paid at Source	32	04
54. Income Tax paid to a foreign country or U. S. possession		
55. Balance of Tax (Item 52 minus Items 53 and 54)	$ 892	30

AFFIDAVIT

Interest on Installment 9 days late 3 3

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 24th day of March, 1930.

NOTARIAL SEAL

R M Cox
(Signature of officer administering oath) (Title)

(Signature of individual or agent)

(Address of agent)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

[Printer's Note—The reverse of this Income Tax Return, not being filled out, is not reproduced in this printed record.]

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.

1. Kind of Property	2. Date	3. Amt. Recd.	5. Cost	7. Net Profit
33 shs. John Bean Mfg. Co.	1928	$ 1551.00	$ 849.75	$ 701.25
$5000 Bonds Hearst Mag. Inc.	June, 1927	5088.33	5075.00	13.33
1000 shs. Borden Milk Co.	1929)	10228.75	9900.00	328.75
10 shs. Borden Milk Co.	1929)			
$5000. Bonds, Mercantile Realty Co.	June, 1927	4878.47	4979.17	100.70
Frac. sh. warrant for 20/50 Byron Jackson stock				7.30
Frac. 10/15 sh. Borden stock at 96¼				64.15
200 shs. Borden Milk Co. at 97		19348.00	18000.00	1348.00
100 shs. Borden Milk Co. at 89		8900.00	9000.00	100.00
				$2262.08
		49994.55	47803.92	
		Profit	2190.63	

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 14, 17 and 18.

(14) Taxes: Alameda Co. & Oakland, Cal. real and personal property taxes $373.24; Tax on Buick Sedan, 24.66; Club dues, $25.20, Stamp tax on stock transfers, $5.48.

(17) Contributions: Community Chest of Oakland $300.00; Happyland Milk Fund, $10.00; St. Paul's Chancel Chapter Benefit $4.00; Grace Cathedral Bldg. Fund, $50.00; Ladies Relief Society Benefit, $5.00; Col. John Jacob Astor Post Benefit, $5.00; Baby Hospital Benefit, $2.00; Red Cross Tuberculosis Fund, $10.00; British Great War Veterans' Relief Fund,

$4.00; Berkeley School for Blind, $5.00; Veterans' of Foreign Wars Relief Fund, $4.00.

(18) Commissions to Wm. Cavalier & Co., Brokers $108.25; Safe deposit box rental $15.00; Premium on bond as guardian of Clay Sherman, minor, $10.00; attorney's fees, Cross & Brandt $12.50; Automobile license fee $3.00; Payment to John & Jane McCann to settle claim against income of trust estate, $1250.00. [49]

Form 1040
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

(Auditor's Stamp)

TENTATIVE RETURN

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929.

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930

PRINT NAME AND ADDRESS PLAINLY BELOW

EDNA F. SHERMAN
(Name)

885 Jayne St.,
(Street and number, or rural route)

Oakland, Calif.
(Post office) (County) (State)

Occupation

Do Not Write in These Spaces

File Code

Serial Number

(Cashier's Stamp)

MAR 14 1930
INTERNAL REVENUE
COLLECTOR

Cash Check M.O. Cert. of Ind.

First Payment

$

Carded

As

1. Are you a citizen or resident of the United States?
2. If you filed a return for 1928, to what Collector's office was it sent?
3. Is this a joint return of husband and wife?
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent
5. Were you married and living with husband or wife on the last day of your taxable year?
6. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year?

Item and Instruction No.	INCOME	Amount received	Expenses paid (Explain in Schedule F)	
1.	Salaries, Wages, Commissions, etc. (State name and address of employer)	$	$	$
2.	Income from Business or Profession. (From Schedule A)			
3.	Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)			
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			
5.	Income from Partnerships. (State name and address)			
6.	Income from Fiduciaries. (State name and address)			
7.	Rents and Royalties. (From Schedule B)			
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			
9.	Dividends on Stock of Domestic Corporations			
10.	Taxable Interest on Liberty Bonds, etc. (From Schedule E)			
11.	Other Income (including dividends on stock of foreign corporations). (State nature of income)			
	(a)			
	(b)			
12.	TOTAL INCOME IN ITEMS 1 TO 11			$
	DEDUCTIONS			
13.	Interest Paid	$		$
14.	Taxes Paid. (Explain in Schedule F)	$		
15.	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)	$		
16.	Bad Debts. (Explain in Schedule F)			
17.	Contributions. (Explain in Schedule F)			
18.	Other Deductions Authorized by Law. (Explain in Schedule F)			
19.	TOTAL DEDUCTIONS IN ITEMS 13 TO 18			$
20.	NET INCOME (Item 12 minus Item 19)			$

AUDIT REVIEW DIVISION
REV. ACT 19..
ASSESSMENT

EARNED INCOME CREDIT

21.	Earned Income (not over $30,000)	$
22.	Less Personal Exemption and Credit for Dependents	
23.	Balance (Item 21 minus 22)	$
24.	Amount taxable at 1½% (not over $4,000)	$
25.	Amount taxable at 3% (not over $4,000)	
26.	Amount taxable at 5% (balance over $8,000 of Item 23)	
27.	Normal Tax (1½% of Item 24)	$
28.	Normal Tax (3% of Item 25)	
29.	Normal Tax (5% of Item 26)	
30.	Surtax on Item 21	
31.	Tax on Earned Net Income (total of Items 27 to 30)	$
32.	Credit of 25% of Tax (not over 25% of Items 30, 44, 45, and 46)	$

COMPUTATION OF TAX (See Instruction 23)

33.	Net Income (Item 20 above)	$
34.	Less: Dividends (Item 9)	$
	Interest on Liberty Bonds, etc. (Item 10)	
36.	Credit for Dependents	
37.	Personal Exemption	
38.	Total of Items 34 to 37	$
39.	Balance (Item 33 minus 38)	$
40.	Amount taxable at 1½% (not over $4,000)	
41.	Balance (Item 39 minus 40)	$
42.	Amount taxable at 3% (not over $4,000)	
43.	Amount taxable at 5% (Item 41 minus Item 42)	$
44.	Normal Tax (1½% of Item 40)	$
45.	Normal Tax (3% of Item 42)	
46.	Normal Tax (5% of Item 43)	
47.	Surtax on Item 20 (see Instruction 23)	
48.	Tax on Net Income (total of Items 44 to 47)	$
49.	Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D)	
50.	Total of or difference between Items 48 and 49	$
51.	Less Credit of 25% of Tax on Earned Income (Item 32)	
52.	Total Tax (Item 50 minus 51)	$
53.	Less Income Tax Paid at Source	
54.	Income Tax paid to a foreign country or U. S. possession	
55.	Balance of Tax (Item 52 minus Items 53 and 54)	$

AFFIDAVIT

Estimated tax : None

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 14th day of March, 1930.

NOTARIAL SEAL

E. Carter
(Signature of officer administering oath) (Title)

Edna F. Sherman
(Signature of individual or agent)

635 Mile Blvd
(Address of agent)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable as per

2—13155

[Printer's Note—The reverse of this Income Tax Return, not being filled out, is not reproduced in this printed record.]

(COPY)
TREASURY DEPARTMENT
Internal Revenue Service
San Francisco, Calif.

Office of the Collector
First District of California
March-14-1930.

Edna F. Sherman,
885 Jayne St.,
Oakland, Calif.

Sir:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for calendar year 1929.

PROVIDED A TENTATIVE RETURN IS FILED WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1930 AND PAYMENT MADE AT THAT TIME OF AT LEAST ONE-FOURTH OF THE TOTAL ESTIMATED TAX SHOWN THEREON TO BE DUE, YOU are hereby granted an extension of time to May 15, 1930.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules shown on the form need not be filled in.

This letter, or a copy thereof, must be attached to both the tentative and completed returns as authority for the extension of time herein granted. The completed return when filed should be plainly marked "completed return."

Respectfully,

ROBT. H. LUCAS,

Commissioner.

By (signed) John P. McLaughlin,

GD Collector. [52]

Form 1040
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930

(Auditor's Stamp) RECEIVED ASSESSMENT $ 2027.13 1ST 2ND 3RD 4TH INSTALLMENT

Do Not Write in These Spaces
File Code 1314
Serial Number 3024459
(Cashier's Stamp) 36908
Cash Check M.O. Cert. of Ind.
First Payment $
Credited
As

PRINT NAME AND ADDRESS PLAINLY BELOW

FREDERIC ROYAL SHERMAN (Name) [redacted]

Bohemian Club (Street and number, or rural route)

San Francisco (Post office) California (County) (State)

Occupation

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1928, to what Collector's office was it sent? San Francisco
3. Is this a joint return of husband and wife? No
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent: Edna Smart Sherman, San Francisco
5. Were you married and living with husband or wife on the last day of your taxable year? No
6. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you? -
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change -
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year? One

Item and Instruction No.	INCOME	Amount received	Business paid (Deductible by Schedule F)						
1.	Salaries, Wages, Commissions, etc. (State name and address of employer) Sherman, Clay & Co	$ 22,500.00	$	$	22	500	00		
2.	Income from Business or Profession. (From Schedule A)								
3.	Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)								
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source								
5.	Income from Partnerships. (State name and address)								
6.	Income from Fiduciaries. (State name and address) L. S. Sherman Trust, Distribution from dividends received by Trust				11	393	61		
7.	Rents and Royalties. (From Schedule B)								
8.	Profits from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)					204	69		
9.	Dividends on Stock of Domestic Corporations					280	00		
10.	Taxable Interest on Liberty Bonds, etc. (From Schedule E)								
11.	Other Income (including dividends on stock of foreign corporations). (Itemize nature of income) (a)								
	(b)								
12.	TOTAL INCOME IN ITEMS 1 TO 11							$ 34	378 30
	DEDUCTIONS								
13.	Interest Paid			$	1	100	30		
14.	Taxes Paid. (Explain in Schedule F)					44	40		
15.	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)								
16.	Bad Debts. (Explain in Schedule F)								
17.	Contributions. (Explain in Schedule F)					100	00		
18.	Other Deductions Authorized by Law. (Explain in Schedule F)								
19.	TOTAL DEDUCTIONS IN ITEMS 13 TO 18							1	244 70
20.	NET INCOME (Item 12 minus Item 19)							33	133 60

EARNED INCOME CREDIT

21.	Earned Income (not over $30,000)	$ 22 500	00
22.	Less Personal Exemption and Credit for Dependents	1 900	00
23.	Balance (Item 21 minus 22)	$ 20 600	00
24.	Amount taxable at 1½% (not over $4,000)	$ 4 000	00
25.	Amount taxable at 3% (not over $4,000)	4 000	00
26.	Amount taxable at 5% (balance over $8,000 of Item 23)	12 600	00
27.	Normal Tax (1½% of Item 24)	$ 20	00
28.	Normal Tax (3% of Item 25)	80	00
29.	Normal Tax (5% of Item 26)	504	00
30.	Surtax on Item 21	350	00
31.	Tax on Earned Net Income (total of Items 27 to 30)	$ 954	00
32.	Credit of 25% of Tax (not over 25% of Items 20, 44, 45, and 46)	$ 224	05

COMPUTATION OF TAX (See Instruction 22)

33.	Net Income (Item 20 above)	$ 33 133	60
34.	Less: Dividends (Item 9)	$ 11 673	61
35.	Interest on Liberty Bonds, etc. (Item 10)		
36.	Credit for Dependents	400	00
37.	Personal Exemption	1 500	00
38.	Total of Items 34 to 37	$ 13 573	61
39.	Balance (Item 33 minus 38)	$ 19 559	99
40.	Amount taxable at 1½% (not over $4,000)	4 000	00
41.	Balance (Item 39 minus 40)	$ 15 559	99
42.	Amount taxable at 3% (not over $4,000)	4 000	00
43.	Amount taxable at 5% (Item 41 minus Item 42)	$ 11 559	99
44.	Normal Tax (1½% of Item 40)	$	20 00
45.	Normal Tax (3% of Item 42)		80 00
46.	Normal Tax (5% of Item 43)		162
47.	Surtax on Item 39 (see Instruction 23)		
48.	Tax on Net Income (total of Items 44 to 47)	$	
49.	Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D)		
50.	Total of or difference between Items 48 and 49	$	
51.	Less Credit of 25% of Tax on Earned Income (Item 32)		
52.	Total Tax (Item 50 minus 51)	$	1
53.	Less Income Tax Paid at Source		
54.	Income Tax paid to a foreign country or U. S. possession		
55.	Balance of Tax (Item 52 minus Items 53 and 54)		1

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 14th day of March, 1930.

F. R. Sherman (Signature of individual or agent)

NOTARIAL SEAL

(Signature of officer administering oath) (Title)

Bohemian Club, San Francisco, Cal. (Address of agent)

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 3)

1. Total receipts from business or profession (state kind of business) ____ $ ____

Cost of Goods Sold

2. Labor	$	
3. Material and supplies		
4. Merchandise bought for sale		
5. Other costs (itemize below or on separate sheet)		
6. Plus inventory at beginning of year		
7. TOTAL (Lines 2 to 6)	$	
8. Less inventory at end of year		
9. NET COST OF GOODS SOLD (Line 7 minus Line 8)	$	

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

OTHER BUSINESS DEDUCTIONS

10. Salaries not included as "Labor," in Line 2. (Do not deduct compensation for your services)	$	
11. Interest on business indebtedness to others		
12. Taxes on business and business property		
13. Losses (explain in table at foot of page)		
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)		
16. Rent, repairs, and other expenses (itemized below or on separate sheet)		
17. TOTAL (Lines 10 to 16)	$	
18. TOTAL DEDUCTIONS (Line 9 plus Line 17)		$
19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 2)		$

Explanation of deductions claimed on Lines 5 and 16 ____

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	4. DEPRECIATION (Explain in table at foot of page)	5. REPAIRS	6. OTHER EXPENSES (Itemize below)	7. NET PROFIT (Enter as Item 3)
	$	$	$	$	$	$

Explanation of deductions claimed in Column 6 ____

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. DEPRECIATION ALLOWABLE SINCE ACQUISITION	5. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	6. SUBSEQUENT IMPROVEMENTS	7. NET PROFIT (Enter as Item 4)
190 Shares Sherman, Clay & Co		$	$	$	$	$
Prior Preferred	1929	$ 705 70		$ 091 64		614 06
Taxpayer's Share 1/3						204 69

State how property was acquired ____

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 8a)

1. KIND OF PROPERTY	2. DATE ACQUIRED (Mo. Day Year)	3. DATE SOLD (Mo. Day Year)	4. AMOUNT RECEIVED	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	7. SUBSEQUENT IMPROVEMENTS AND CAPITAL DEDUCTIONS	8. NET GAIN OR LOSS (Enter 12½% on Item 4b)
			$	$	$	$	$

State how property was acquired ____

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 10)

1. OBLIGATIONS OR SECURITIES	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. PRINCIPAL AMOUNT EXEMPT FROM TAXATION	5. AMOUNT OWNED IN EXCESS OF EXEMPTION	6. INTEREST ON AMOUNT IN EXCESS OF EXEMPTION (Enter as Item 10)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	XXXXXX	XXXXXX
(b) Securities issued under Federal Farm Loan Act or as Amended, and Certificates of Indebtedness issued after June 17, 1929			All	XXXXXX	XXXXXX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions			All	XXXXXX	XXXXXX
(d) Liberty 4% and 4¼% Bonds, Certificates of Indebtedness issued before June 12, 1929, Treasury Bonds and Savings Certificates			$5,000	$	$
(e) Treasury Notes			None		

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Tax on Club Dues	$44.40
Contribution-Community Chest	$100.00

PREPARED BY
SKINNER & HAMMOND
CERTIFIED PUBLIC ACCOUNTANTS
HUNTER DULIN BUILDING
San Francisco

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY (If building, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. PROBABLE LIFE AFTER ACQUIREMENT	5. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER (Exclusive of Land)	AMOUNT OF DEPRECIATION CHARGED OFF	
					6. Previous years	7. This year
				$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 15

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	4. SUBSEQUENT IMPROVEMENTS	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. INSURANCE AND SALVAGE VALUE	7. DEDUCTIBLE LOSS
		$	$	$	$	$

9—16155

122

[Endorsed]: United States Board of Tax Appeals. Lodged May 9, 1934.

[Endorsed]: United States Board of Tax Appeals. Filed May 10, 1934.

[Title of Court and Cause.]

PRAECIPE FOR THE RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

(1) The docket entries of proceedings before the United States Board of Tax Appeals;

(2) Pleadings before the Board;

(3) Opinion, and decision of the Board;

(4) Petition for review;

(5) Statement of the evidence taken before the Board; and (6) this Praecipe:

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court [55] of Appeals for the Ninth Circuit.

Dated: San Francisco, California, May 2, 1934.

E. D. TURNER, JR.,
Attorney for Appellant.

[Endorsed]: United States Board of Tax Appeals. Filed May 9, 1934. [56]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 56, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 17th day of May, 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7483. United States Circuit Court of Appeals for the Ninth Circuit. Edna Smart Sherman, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 21, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7483

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDNA SMART SHERMAN,
Petitioner,

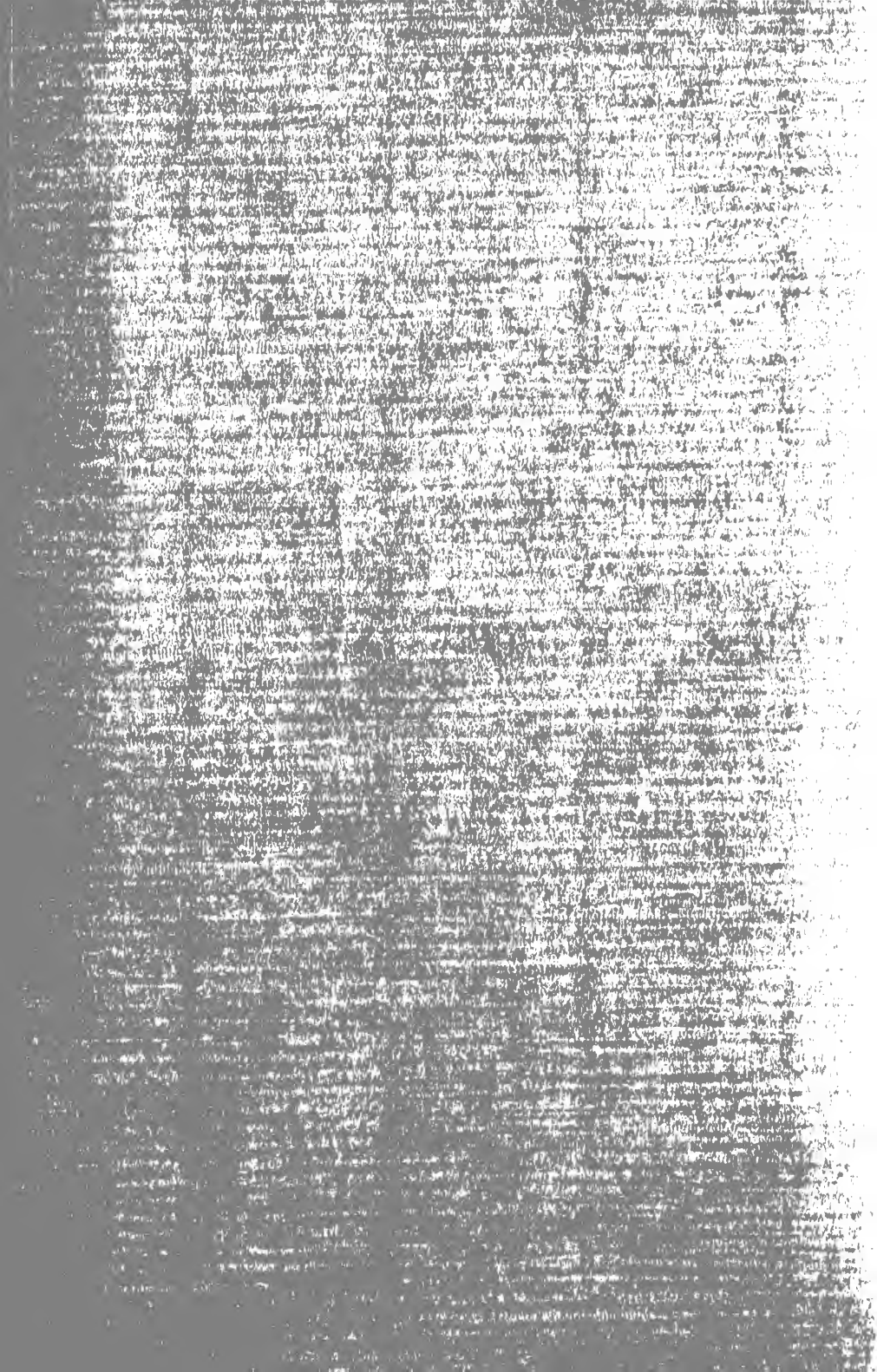
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONER.

SLOSS & TURNER,
E. D. TURNER, JR.,
Attorneys for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO



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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDNA SMART SHERMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is a petition for a review of a decision of the United States Board of Tax Appeals entered December 28, 1933, approving a deficiency in income tax of the petitioner for the calendar year 1929, in the amount of $7,243.90.

The following facts appear from the record:

The petitioner and Frederic R. Sherman are, and for many years have been, husband and wife, each residing and domiciled, though apart, in the State of California. In the year 1926 the petitioner and her husband separated and thereupon entered into a separation agreement dated May 12, 1926 (Transcript pp.

29-32), which was later modified by an agreement dated February 11, 1927 (Transcript pp. 33-35). By said agreements petitioner and her husband defined and determined their respective rights and interests in and to all of the property of the husband, both real and personal, community and separate. It was the intention of petitioner and her husband by said agreements to terminate the community interest of the petitioner in and to any part of the earnings of her husband thereafter accruing. The petitioner and her husband have lived separately and apart ever since March, 1926, though they have not been divorced. Such was their relationship during the taxable year 1929, and such it is at this time.

The transfers agreed to be made in the agreements were made and the monthly payments of $1,000 each therein provided to be made by the husband to petitioner were made up to the calendar year 1929 (Transcript p. 47). During the year 1929 petitioner received only three of these payments, or $3,000 (Transcript pp. 50-51). Petitioner received no other money or property of any kind from her husband during the taxable year 1929. Her husband's salary during that year was $22,500 which, in conformity with the separation agreements, he reported as taxable income, paying a tax thereon (Transcript p. 63). Similarly, the petitioner did not return any portion of this salary.

The Commissioner has determined that one-half of the salary earned by the husband of the petitioner, Frederic R. Sherman, during the calendar year 1929 was taxable to the petitioner.

Upon the foregoing facts the Board of Tax Appeals held that the Commissioner was correct in taxing to petitioner one-half of the salary earned by her husband during the calendar year 1929 (Transcript pp. 37-40). The Board of Tax Appeals thereupon entered an order of "a deficiency of $7,243.90 for the year 1929" (Transcript p. 41). From the order so entered the petitioner petitioned this Court for review (Transcript pp. 41-46).

SPECIFICATION OF ERROR.

The United States Board of Tax Appeals erred in affirming the determination of the Commissioner of Internal Revenue that one-half of the salary of the husband of the petitioner, Frederic R. Sherman for the year 1929 was taxable to the petitioner, for the reason that petitioner's community interest therein was theretofore severed by contract.

ARGUMENT.

THE RULE LAID DOWN IN THIS CASE IS CONTRARY TO OTHER SUBSEQUENT DECISIONS OF THE BOARD AND TO THE LAW OF THIS CIRCUIT.

The decision of the Board of Tax Appeals in this case was that husband and wife residing in California could not by contract terminate their respective community interests in the earnings of the other thereafter to accrue, to the end that no tax would be payable by one spouse for the salary earned

by the other. Although the petitioner had by contract severed her community interest in her husband's future earnings, the Board held that she nevertheless should pay a tax upon one-half of the husband's salary for the year 1929. During the time the instant action was pending and since the Board's decision therein, however, it was held to the contrary in three cases (*Grant v. The Commissioner,* 29 B. T. A. 760; *Skewes-Cox v. The Commissioner,* 29 B. T. A. 167; *Helvering v. Hickman,* 27 B. T. A. 807), and the question has been similarly determined by this court of appeals in affirming the *Hickman* decision (*Helvering v. Hickman* (1934) 70 Fed. (2d) 985).

We submit, therefore, that the settled law of this circuit now is that husband and wife can by contract change their interest in each other's future personal earnings, to the end that the salary of the husband or the wife, as the case may be, does not thereafter become community property, taxable to both equally, but, on the other hand, remains the separate property of the one earning it and is taxable only to that person. The rule laid down by the Board of Tax Appeals in the instant case is in direct conflict with the rule laid down by this court in the case of *Helvering v. Hickman,* supra.

THE CONTRACT INVOLVED TERMINATED PETITIONER'S COMMUNITY INTEREST IN HER HUSBAND'S FUTURE EARNINGS.

In addition to declaring that the petitioner could not by contract terminate her community interest in the

future earnings of her husband, the Board declared that by its own terms the contract here involved did not do so. A question of construction of the agreement of the petitioner and her husband (Transcript pp. 29-32) is therefore involved in this appeal. In this connection, the contract as a whole, the surrounding circumstances and the object of the agreement must be looked to and taken into account in determining the intention of the parties. If the provisions of the contract as a whole are susceptible of an interpretation which will give effect to the mutual lawful intention of the parties, as it is thus found to have existed at the time of contracting, the court is bound to give them that interpretation.

Lemm v. Stillwater Land & Cattle Co., (1933) 217 Cal. 474, at pp. 480-1.

The contract counted upon is a separation agreement made between the petitioner and her husband in 1926, when they ceased living together (Transcript pp. 29-32). While the agreement was somewhat modified thereafter (Transcript pp. 33-35), the modification is of no importance in this determination. This is not a situation in which husband and wife living together attempt by contract for the purpose of convenience to shift tax liabilities. The record is clear that the petitioner and her husband have lived separate and apart ever since the date of the execution of their agreement in 1926. It is further clear that while the husband agreed to pay the petitioner $1,000 a month as support for her and the three minor children of the marriage, he has failed to carry out this part of his

agreement, to the end that the petitioner finds herself in a position of being taxed with one-half of her husband's earnings in the year 1929, when she has not only severed her community interest in his earnings but further, when he has failed to support her or her children.

There is no dispute between the parties to the agreement. The separation agreement was one in which they both sought to make a division of all of their property interests, both real and personal, and to provide for the care and support of the petitioner and the children of the marriage. As testified by the petitioner and confirmed by her husband (Transcript pp. 50-51), both intended by the agreement "to make a complete division" of their property rights, terminating their "community interest in any property then existing and in his (the husband's) earnings and salary thereafter". They both considered that the effect of the contract was to sever their community interest in the husband's salary. They not only so testified in this case, but by their conduct they so construed the agreement. The husband, in his own individual tax return for the year in question, returned and paid a tax on the whole of his salary (Transcript p. 50), and your petitioner, accordingly, did not return any part of the salary (Transcript p. 55). The testimony of the parties as to their intention in executing the separation agreement was relevant and properly received by the Board and may be looked to in construing the separation agreement (*Nolan v. Nolan,* 155 Cal. 476, at p. 482; *Ruiz v. Dow,* 113 Cal. 490, at p. 497), and the

construction placed upon the contract by the conduct of the parties is particularly significant in the determination of the meaning of the agreement. As was said in *Storm & Butts v. Lipscomb* (1931), 117 Cal. App. 6, at p. 15:

> "At the trial of the case the plaintiffs were permitted to show by oral testimony that the plans and specifications were from the inception of the contract accepted by Lipscomb & Dutton as the basis of all their dealings on the subject matter, that they formed the basis of their bid and were consulted during the construction of the work. The plaintiffs do not seek to contradict by parol proof the covenants of the contract in question. 'In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty' (*Mitau v. Roddan,* 149 Cal. 1 (6 L. R. A. (N. S.) 275), 84 Pac. 145)".

See also:

> *Mitau v. Roddan,* 149 Cal. 1, at pp. 14-16;
> *Hansen v. D'Artenay,* 121 Cal. App. 746, at pp. 756-7.

We submit further that so long as the parties to the agreement are in accord as to its interpretation that it does not lie in the power of the Commissioner to

place a different construction thereon so that he can collect, in the aggregate, a greater tax from both parties.

CONCLUSION.

In conclusion, we respectfully submit:

(a) that an agreement between husband and wife residing in California, terminating their community interest in community property, including future earnings of the husband, is valid and effective; and

(b) that your petitioner and her husband did by their separation agreement of May 12, 1926, so terminate their community interest in the future earnings of the husband, and that therefore no part thereof subsequent to the date of the agreement, which includes the taxable year in question, 1929, can be taxed to her.

Respectfully submitted,

SLOSS & TURNER,
E. D. TURNER, JR.,
Attorneys for Petitioner.

No. 7483

In the United States Circuit Court of Appeals for the Ninth Circuit

EDNA SMART SHERMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN MacC. HUDSON,
FREDERICK W. DEWART,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7483

EDNA SMART SHERMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 37–40), which is reported in 29 B. T. A. 616.

JURISDICTION

The appeal involves income taxes for the year 1929 and is taken from an order of the Board of Tax Appeals entered on December 28, 1933 (R. 41). The case is brought to this Court by petition for review filed March 15, 1934 (R. 41–46), pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

By the agreement of May 12, 1926, did petitioner waive or transfer to her husband her interest in the community income, including his salary?

STATUTES INVOLVED

The applicable provisions of the statutes involved will be found in the Appendix, *infra,* pp. 13–14.

STATEMENT

The Board made findings of fact, which were in substance, as follows (R. 37–38):

The petitioner is, and for a long time prior to the taxable year, was the wife of Frederick Royal Sherman. Husband and wife are residents of San Francisco, California, but since some time in 1926 have lived separately. On May 12, 1926, they entered into an agreement in which the husband agreed to transfer all his rights, title, and interest in certain real and personal property to the petitioner. That agreement reads as follows (R. 29):

> WITNESSETH: Whereas the parties hereto are husband and wife, and have three minor children, namely, Mary Frances Sherman, Edna Sherman, and Clay Sherman; and
>
> WHEREAS the party of the first part desires to insure the future support and maintenance of his said wife and children;
>
> NOW, THEREFORE, said party of the first part, in consideration of the sum of One ($1.00) Dollar in hand paid, the receipt of which is hereby acknowledged, and of the love and affection which he has for his said

family, and for the purpose of insuring their future support and maintenance, undertakes and agrees as follows:

Said first party agrees to and he does hereby transfer and convey * * *.

Certain property is thereafter enumerated.

It also provides (R. 31):

> Said first party further agrees that he will pay to said second party the sum of One Thousand ($1000.00) Dollars per month for the support and maintenance of said second party and said minor children, beginning on the 1st day of June 1926.

And also (R. 32):

> In event said second party should remarry, said monthly payment of $1,000.00 shall be reduced to an amount which in the opinion of said second party would be sufficient and adequate for the support, maintenance, education and care of the children of the parties hereto.

The instrument evidencing such agreement specifies and describes all the assets to be transferred. It makes no mention of community property or community interests. In it there is no mention of income or of the right to receive income. This agreement was subsequently somewhat amended but the changes are not material to the issues here. In the taxable year the husband received a salary of $22,500 and in his Federal income-tax return included the whole amount thereof in his gross income. Upon audit the respondent de-

termined that one half the husband's salary, or $11,250, should be taxed to the wife and determined a refund to the husband in the amount of $1,007.13, which was paid to him. In her return for 1929 the petitioner reported no part of her husband's salary as income. Upon audit of such return the respondent added the amount of $11,250 representing one half the husband's salary for the taxable year to petitioner's gross income, made other adjustments not now material here, and determined the deficiency under review.

The Board sustained the Commissioner, holding that the sum of $11,250 should be included in petitioner's return as income and determined a deficiency income tax, due on this and certain other adjustments, in the amount of $7,243.90.

SUMMARY OF ARGUMENT

United States v. *Malcolm,* 282 U. S. 792, determined that the wife should pay Federal income tax on one-half of the community income of husband and wife domiciled in California. Petitioner and her husband were a marital community at all times during 1929. The agreement between petitioner and her husband of May 12, 1926, transferred certain rights and property to her, and he agreed to pay her a certain sum monthly, but the agreement makes no mention of community property or community interests and no mention of income or the right to receive income. This agreement is unambiguous, full, and complete, contains all the terms

of the agreement, and cannot be varied or added to by testimony of the parties. The agreement does not waive or transfer to the husband, petitioner's interest in his salary or other income, and petitioner must report and pay Federal income tax on her one-half of his salary and the other community income. No cases have been found which hold otherwise, and the decision of the Board in this case is in strict accord with the decision of this Court in *Helvering* v. *Hickman,* 70 F. (2d) 985.

ARGUMENT

Under the agreement of May 12, 1926, petitioner did not waive or transfer to her husband her interest in the community income and one-half of the husband's earnings are her income under the Federal tax statutes

In *United States* v. *Malcolm,* 282 U. S. 792, the Supreme Court of the United States held that the wife should separately report and pay income tax on one-half the community income of the husband and wife domiciled in California.

The rights of the husband and wife in property are determined by the Civil Code of California, 1931, in Sections 161 (a), 162, 163, 164, and 177, *infra,* pp. 13–14.

In 1929 petitioner's husband received a salary of $22,500. This was income of the community unless the marital community ended before that time or unless petitioner had waived or transferred to her husband, as his separate property, her interest in that income.

The community existed and survived throughout that taxable year. In California the community ends only with the death of one of the parties or by legal decree of divorce. Neither of these elements had occurred in this case.

Under the California decisions not even an interlocutory decree of divorce terminates the community. *Estate of Seiler,* 164 Cal. 181; *Olson* v. *Superior Court,* 175 Cal. 250; *Brown* v. *Brown,* 170 Cal. 1, cited with approval by this Court in *Patents Process, Inc.* v. *Durst,* 69 F. (2d) 1014.

Petitioner contends that by the agreement of May 12, 1926, she waived or transferred to her husband her interest in the community income. We maintain there is no basis whatever for this claim.

The agreement of May 12, 1926, states (R. 29):

> WHEREAS the party of the first part desires *to insure the future support and maintenance of his said wife and children;*
>
> NOW THEREFORE, said party of the first part, in consideration of the sum of One ($1.00) Dollar in hand paid, the receipt of which is hereby acknowledged, and of the *love and affection which he has for his said family, and for the purpose of insuring their future support and maintenance* * * *.
>
> * * * * *
>
> Said first party further agrees that he will pay to said second party the sum of One Thousand ($1,000.00) Dollars per month *for the support and maintenance of said second party and said minor children,* * * *. (Italics supplied.)

In said supplementary agreement of February 11, 1927, it is stated (R. 33):

> WHEREAS the parties hereto did on the 12th day of May 1926 make and enter into an agreement of that date *with reference to the proper future support and maintenance by said first party of said second party and the children of said parties;* * * *. (Italics supplied.)

These instruments bear evidence of having been carefully drawn and by a lawyer.

Section 1638 of the Civil Code of California, 1931, provides:

> The language of the contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

And Section 1639 of that Code provides:

> When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this title.

Section 1856 of the Code of Civil Procedure, 1931, provides that when the terms of an agreement have been reduced to writing, it is to be considered as containing all of the terms.

It will be observed that petitioner gives nothing whatever of any kind. As we have noted, the sole consideration for the transfer from the husband is his love and affection for his wife and children.

Nowhere in the agreement does the petitioner transfer, convey, or relinquish any property or right of property or community interest.

There is nothing to indicate how much, if any, other property or rights the parties possessed, and it does not specify that it is a full property settlement.

The language of the agreement "is clear and explicit, and does not involve an absurdity", and, therefore, "the intention of the parties is to be ascertained from the writing alone". (Civil Code of California, 1931, Secs. 1638, 1639, *supra.*)

Petitioner was asked the leading question if she intended to make a complete division of her property rights with her husband, terminating her community interest in any existing property and in his earnings and salary thereafter. She said, "Yes; I did." The Board member allowed the question over the objection of the Commissioner, by saying, "I think you may ask the question. I don't think it can have any effect. We will interpret the contract according to its terms. We have no choice in the matter" (R. 51).

While we believe that the answer should have been stricken, the accompanying statement of the Board member was strictly correct. In *Lemm* v. *Stillwater Land & Cattle Co.,* 217 Cal. 474, 482, the court said (p. 482):

> Whether as a question of fact the parties had the intention to contract with reference

> only to those matters or things which comprised the subject of the action in which the agreement was filed was a question primarily for the trial court to decide from the evidence of the surrounding circumstances and the negotiations leading up to the embodiment of the agreement into its written form. The court, if it erred at all in this respect, committed error in permitting any of the parties to the negotiations to testify respecting his belief or conclusion as to what was included in the settlement. "*Swain* v. *Grangers Union* (69 Cal. 186 [10 Pac. 404].)
> * * *.

The finding by the Board of the ultimate fact that petitioner did not waive or transfer to her husband her interest or share in his earnings, has substantial evidence to sustain it, and, therefore, is binding on this Court. *Tricou* v. *Helvering,* 68 F. (2d) 280 (C. C. A. 9), certiorari denied, 292 U. S. 655; *Winnett* v. *Helvering,* 68 F. (2d) 614 (C. C. A. 9).

Section 1647 of the Civil Code of California, 1931, provides that a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. The rule of evidence embodied in this section may be invoked only in cases where, upon the face of the contract itself, there is a doubt, and the evidence is used to expel that doubt. *United Iron Wks.* v. *Outer H. etc. Co.,* 168 Cal. 81.

There is no doubt or possible question on the face of the contract or in the wording of the contract as to what it says and means, so that testimony may not be admitted to change or add to the contract. We submit that it is complete, clear, explicit, and final.

The decision of the Board is strictly in accordance with the decision of this Court in *Hervering* v. *Hickman*, 70 F. (2d) 985. In that case there was an agreement between husband and wife that the earnings of each was to remain his separate property, and it was held that those earnings never became community property. The Court said (pp. 987–988):

> By the law of California, as construed by her courts, the earnings of the wife never became community property if the husband and wife have agreed that they shall be and remain her separate property, hence, under the decision in *Poe* v. *Seaborn,* such earnings *should not be taxed as income to the husband.*
>
> The government relies upon our decisions in *Blair* v. *Roth,* 22 F. (2d) 932, decided December 1927, and *Belcher* v. *Lucas,* 39 F. (2d) 74, decided March 31, 1930. Both of these cases were decided before the decision of the Supreme Court in *Poe* v. *Seaborn, supra,* and of course, if inconsistent therewith, were overruled thereby. In *Blair* v. *Roth, supra,* the contract between the spouses was held by this court to be in-

> sufficient to constitute a portion of the income of the community the separate property of the wife. The agreement in the case of *Belcher* v. *Lucas, supra,* was held by us to be substantially the same as that in *Blair* v. *Roth.* In neither case was there a clear-cut agreement that the wife should have her own earnings as her separate property; in both cases there was a partnership agreement by which the earnings of both were joined in one fund to pay expenses of both and remainder only was to be owned equally. It was held in both cases that the earnings of the husband and of the wife became community property before the agreement became effective to make the balance after payment of expenses, separate property.

The cases cited by petitioner are all based on different facts, as the husband and wife in those cases had made an express agreement with regard to their earnings, so that none of those cases are applicable to the case in hand. We have found no cases which would sustain petitioner's claim.

There being no reference in the agreement to any waiver by this petitioner of her share of community income, the rights and obligations of the parties with respect to the community income, including the duty to report and pay a tax thereon, are the same as if the agreement of May 12, 1926, had never been entered into, and the income of the community belongs one-half to each spouse and must be so reported for Federal income-tax purposes.

CONCLUSION

We submit the decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
JOHN MACC. HUDSON,
FREDERICK W. DEWART,
Special Assistants to the Attorney General.

JANUARY 1935.

APPENDIX

Civil Code of California, 1931:

Section 161a. Interests in community property.—The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in section 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 162. Separate property of the wife.—All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

Section 163. Separate property of the husband.—All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

Section 164. Property acquired after marriage.—All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired

while domiciled in this state is community property; * * *.

Section 177. Rights of husband and wife governed by what.—The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

U. S. GOVERNMENT PRINTING OFFICE: 1935

No. 7484

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID GORDON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 7484

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID GORDON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Docket No. 54949

APPEARANCES.

For Taxpayer:
FRED HOROWITZ, Esq.

For Comm'r.:
A. L. MURRAY, Esq.,
ALVA C. BAIRD, Esq.

DOCKET ENTRIES.

1931

Mar. 30—Petition received and filed. Taxpayer notified. (Fee paid)

" 30—Copy of petition served on General Counsel.

Sep. 18—Answer filed by General Counsel.

Oct. 1—Copy of answer served on taxpayer. Circuit Calendar.

1933

Aug. 3—Hearing set in Long Beach, Calif. beginning Sept. 25, 1933.

Sep. 26—Hearing had before Mr. Van Fossan on merits. Submitted. Petitioner's brief due Nov. 11, 1933. Respondent's none. Oral argument.

Oct. 7—Transcript of hearing of Sept. 26, 1933 filed.

Nov. 9—Brief filed by taxpayer.

Nov. 22—Memorandum opinion rendered, E. H. Van Fossan, Div. 9. Decision will be entered for the respondent.

Nov. 24—Decision entered, E. H. Van Fossan, Div. 9.

1934

Feb. 24—Petition for review by U. S. Circuit Court Court of Appeals (9) with assignments of error filed by taxpayer.

Feb. 24—Proof of service filed by taxpayer.

Apr. 4—Motion for extension of 30 days to settle evidence and transmit record filed by taxpayer.

Apr. 4—Order enlarging time to May 25, 1934 for preparation of evidence and delivery of record entered.

Apr. 27—Agreed statement of evidence lodged.

Apr. 27—Praecipe filed.

Apr. 27—Proof of service of praecipe filed.

Apr. 28—Agreed statement of evidence approved and ordered filed. [1*]

United States Board of Tax Appeals

Docket No. 54949

DAVID GORDON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by

*Page numbering appearing at the foot of page of original certified Transcript of Record.

the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:E-1 BAG-60D, dated March 9, 1931, and as a basis for his proceeding alleges as follows:

1. That petitioner is an individual, residing at 629 South June Street, in the City of Los Angeles, County of Los Angeles, State of California.

2. That the Notice of Deficiency, a copy of which is attached and marked Exhibit "A", was mailed to petitioner on March 9, 1931. [2]

3. The taxes in controversy are income taxes for the calendar year 1928, and the deficiency is for $2,614.50.

4. The determination of the tax set forth in the said Notice of Deficiency is based on the following error:

That petitioner was not permitted to divide community income for year 1928 with his wife, but the whole of said community income was assessed as against petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

All of the property owned by petitioner was acquired subsequent to his marriage; that during the year 1928, and pursuant to amendment of the community property laws of the State of California, and pursuant to agreement between petitioner and his wife, he divided the community income; that if effect were given to the community property laws of the State of California and to the agreement between petitioner and his said wife, there would

be no deficiency in the sum of $2,614.50, or any other sum. [3]

Petitioner prays for relief from the deficiency asserted by respondent in the following particular:

That he be permitted to return but one-half of the income of the community property.

WHEREFORE, petitioner prays that this Board may herein determine the deficiency herein alleged.

FRED HOROWITZ
Counsel for Petitioner
385 West Eighth Street
Los Angeles, California. [4]

State of California,
County of Los Angeles—ss.

DAVID GORDON, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein; that the facts stated are true, except as to the facts stated to be upon information and belief, and as to those facts, he believes it to be true.

DAVID GORDON

Subscribed and sworn to before me this 23rd day of March 1931.

[Seal] PAUL J. FRITZ
Notary Public in and for the County of Los Angeles, State of California. [5]

EXHIBIT "A"

TREASURY DEPARTMENT
WASHINGTON

Mar. 9, 1931

Office of
Commissioner of Internal Revenue
Mr. David Gordon
629 South June Street
Los Angeles, California.
Sir:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $2,614.50, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or

on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET
Commissioner
By J. C. Wilmer
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [6]

STATEMENT

IR:AR:E-1
BAG-60D
in re: Mr. David Gordon,
629 South June Street
Los Angeles, California

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1928	$4,093.57	$1,479.07	$2,614.50

The report of the internal revenue agent in charge at Los Angeles, California, a copy of which was furnished you, is approved and is hereby made a part of this letter.

Careful consideration has been accorded your protest dated February 9, 1931, in connection with

the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

It was contended that the income reported by your wife on a separate return represented her share of community income for that year.

However in view of the decision of the United States Supreme Court on January 19, 1931 in the case of Robert K. Malcolm it appears that it has not been established that the income reported by you and your wife is community income in accordance with I. T. 2457, Cumulative Bulletin VIII-1, page 89, for the reason that the income involved has not arisen from sources where services were an income producing factor in that the returns indicate no income from salaries, fees, commissions, etc.

Further, there is no indication that any material amount of income has been earned since July 29, 1927 from services which could have been used to acquire any of the property from which income is reported in the year 1928. Consequently no part of this property can be considered to constitute community property and no part of the income therefrom can be considered to constitute community income. [7]

Therefore the income divided between yourself and wife in the returns filed has been adjusted and all divisions of alleged community income have been eliminated.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax

against you for the year 1928, the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

[Endorsed]: United States Board of Tax Appeals. Filed March 30, 1931. [8]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1, 2 & 3. Admits the allegations of paragraphs 1, 2 & 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. Denies the allegations of fact contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the petitioner be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Received Sep. 13, 1931.

[Endorsed]: United States Board of Tax Appeals. Filed Sep. 18, 1931. [9]

[Title of Court and Cause.]

MEMORANDUM OPINION.

VAN FOSSAN: In this case we are asked to redetermine a deficiency of $2,614.50 for the year 1928. Petitioner alleges that respondent erroneously refused to permit him to divide community income for the year 1928 with his wife, the whole being assessed against petitioner.

Petitioner was born in the United States but when an infant moved, with his parents, to Canada where the parents became naturalized citizens. Petitioner remained in Canada many years, and married there. At marriage petitioner had no property or funds but his wife received $3,000 [10] as a gift from her parents. After marriage petitioner and his wife

agreed that everything was to be on a "fifty-fifty" basis. Petitioner and his wife took the $3,000 and started a small manufacturing business in men's and women's clothing. The business prospered and was continued until about 1921 when petitioner and his wife moved to California, bringing with them in excess of $200,000. This money was variously invested, much of it being lost before the taxable year. It is the income from such property that is in question for 1928.

Previous to 1928 petitioner filed a joint return for himself and his wife. For 1928 they filed separate returns in which certain items of income were divided equally and other items unequally. Petitioner's gross income is shown as $45,620.74 with a net income of $27,844.56 while Lillian Gordon, the wife, returned $21,901.41 as gross and $15,721.96 as net income.

In this case we are concerned with the title to the property as acquired and when petitioner and his wife moved from Canada to California. The subsequent status of the property depends on the prior status.

It is elaborately argued on brief by counsel for the petitioner that in Quebec community property is the law unless abridged by agreement, that in the case of petitioner and his wife the oral agreement that everything was to be "fifty-fifty" superseded the community property status and governed the title to the $200,000 in personal property when the same was brought to California. However, as laid

[11] down by Marshall, C. J., in Church v. Hubbart, 2 Cranch 187, 236, "foreign laws are well understood to be facts which must, like other facts be proved to exist, before they can be received in a court of justice." This rule is binding on the Board, Columbian Carbon Co., 25 B. T. A. 465. Petitioner failed either to plead or prove the pertinent law of Canada respecting title to property. We can not assume it or take judicial notice of the same. Nor is quotation of such laws in the brief sufficient. The record fails to show that community property obtains in Canada, that it may be superseded by agreement of the parties, or even that husband and wife are free to contract with each other with respect to property. We are left in entire ignorance of the status or ownership of property in Canada.

In this situation we can not determine the ownership of the property either as acquired or at the time of removal to California. Thus, not knowing the ownership of the property in Canada it is impossible to determine what the status of the property would be in California, whether it was separate or joint or community property or perchance fell in some other category.

It is therefore unnecessary to determine the efficacy in law of the so-called "fifty-fifty" agreement.

Lacking proof of essential facts we have no alternative but to hold that petitioner has not established that respondent was in error.

Decision will be entered for the respondent.

[Endorsed]: Entered Nov. 22, 1933. [12]

United States Board of Tax Appeals
Washington

Docket No. 54949

DAVID GORDON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered November 22, 1933, it is

ORDERED and DECIDED: That there is a deficiency of $2,614.50 for the year 1928.

[Seal] (Signed) ERNEST H. VAN FOSSAN
Member.

[Endorsed]: Entered Nov. 24, 1933. [13]

[Title of Court and Cause.]

PETITION FOR REVIEW.

I. Nature of the Controversy.

The Commissioner of Internal Revenue determined a deficiency of Twenty-six Hundred Fourteen & No/100 Dollars ($2614.00) in petitioner's payment of income tax for the year 1928, and on appeal to the Board of Tax Appeals, this determination was upheld [14] by an order of the Board entered November 24th, 1933.

Petitioner and his wife filed separate returns for the tax year in question, dividing their income unequally. The Commissioner denied the propriety of the separation of income, and arrived at the claimed deficiency by taking as a tax basis the aggregate of all income reported by petitioner and his wife.

The petitioner claims that by contract between himself and wife, all their property, from whatever source obtained, was held by them as tenants in common, and the income therefrom was properly divisible for income tax purposes.

The Board of Tax Appeals held that as the California property was acquired with the proceeds of the sale of property acquired in Canada while the spouses were there domiciled, and as there was no plea or proof as to the legal status of the property in Canada or as to the effect in Canada of the contract, it would not take judicial notice of, or assume, the Canadian law, and that the petitioner had therefore failed to sustain the burden of proof.

[15]

II. Court of Review.

The court in which review is sought is the United States Circuit Court of Appeals, Ninth Circuit.

III. Assignments of Error.

1. The Board of Tax Appeals erred in failing to take into account as evidence the presumption that the pertinent Canadian laws are the same as the laws of California on the particular subject involved.

3. The Board of Tax Appeals erred in failing to give effect to the contract between petitioner and his wife which created a tenancy in common as to all of their property.

4. The Board of Tax Appeals erred in determining that any deficiency exists.

5. The Board of Tax Appeals erred in holding that, under the evidence, the wife of petitioner had no separate interest in the aggregate income of the spouse. [16]

IV. Statement of Additional Evidence.

The petitiioner accepts the statement of evidence contained in the memorandum opinion filed by Ernest H. Van Fossan, member of the Board of Tax Appeals, as the basis of the decision herein sought to be reviewed by inserting the following matter, subject to settlement by the Board of Tax Appeals in accordance with Rule 38 of the Circuit Court of Appeals, Ninth Circuit, and Rule No. 75 of the Equity Rules of the Supreme Court of the United States.

From the time of the marriage, up to the time of the hearing on the Field Calendar at Long Beach on September 26, 1933, it was the custom, practice and understanding of the parties to treat all property acquired with the proceeds of the business, as owned by each of the parties an undivided one-half interest, and to require the assent of both to any purchases or sales of property of any substantial value. This custom, practice and understanding ap-

plied to all property acquired in California after establishment of the residence of the spouses in that State, as well as all property acquired in Canada with the proceeds of which the California property was acquired. [17]

WHEREFORE, petitioner prays that a petition for review be allowed and that the order and decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals, Ninth Circuit.

DAVID GORDON,
Petitioner.
FRED HOROWITZ,
Counsel for Petitioner.

State of California,
County of Los Angeles.—ss.

DAVID GORDON, being by me first duly sworn, deposes and says: That he is the petitioner in the above entitled action; that he has read the foregoing Petition for Review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

DAVID GORDON.

Subscribed and sworn to before me this 8th day of February, 1934.

(Seal) HELEN KIRKPATRICK,
Notary Public in and for said County and State.

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 24, 1934. [18]

In the United States Circuit Court of Appeals for the Ninth Circuit.

DAVID GORDON,

Petitioner,

v.

B.T.A.

No. 54949.

GUY T. HELVERING,

Commissioner of Internal Revenue,

Respondent.

AGREED STATEMENT OF THE EVIDENCE.

The above entitled cause came on for hearing before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals, on September 26, 1933, there being present the petitioner by his counsel, Fred Horowitz, and the respondent by his counsel, A. L. Murray and Alva C. Baird.

Whereupon, the petitioner, to maintain the issues on his behalf, introduced the following testimony:

DAVID GORDON,

the petitioner, being first duly sworn testified in substance as follows:

I reside in Los Angeles. I have lived in Los Angeles approximately 11 or 12 years. I was married in Canada. At the time of my marriage I set up housekeeping in Montreal.

I was there in Montreal from the time of the marriage until we moved to California, about 11 or 12 years ago.

(Testimony of David Gordon.)

At the time of my marriage my business or occupation was that of a traveling salesman.

At the time of my marriage I had no real or personal property of any kind, nothing except my salary. [19]

At the time of my marriage my wife's father gave her a sum of money. The amount of the sum of money was about three thousand dollars.

After I worked for a few months my wife and I started in business. I conducted that business until we came to California.

Prior to my marriage, we did not enter into a written prenuptial agreement but we discussed it several times that everything we made was 50-50. We did not enter into any agreement in writing. In Quebec a prenuptial agreement is usually entered into which is usually against the wife's interest in this way, that if a man would have property he would agree to give his wife—well, if he was worth a hundred thousand dollars he would agree to give his wife so much, and she would resign and waive all her community rights and her partnership rights. My wife was against anything of that nature and she said we would be 50-50. I did not enter into any prenuptial agreement whereby my wife waived any rights in my property.

I conducted that business until the time I came to California. It was the clothing business.

When I came to California we started to take our funds and invest them in real estate and other

(Testimony of David Gordon.)

things. Those were the funds which I brought from Canada and which I have not got, they have diminished. Yes,—the funds have diminished since arriving in the United States. I have a very, very small percentage of it now, but, of course, that is not in this case.

The gist of the conversations with my wife was as follows:

I could not, on any transaction that amounted to real money, do anything unless my wife agreed to it, because it was hers as much as mine.

From the time of my marriage up to the present time, my practice [20] with respect to either the purchase or sale of any properties has been that if the deal was advantageous to us both, and she objected to it, it wouldn't happen, that is all. It is the same right now.

Whenever my wife wants any money, for any purpose at all, she just says "get it" and that is all there is to it. My wife would feel highly insulted, and I would feel I was stealing it from her if I raised the question that she did not own one-half of my property, or tried to take any more than half of what was owned, in my own right, for my benefit.

At the time when I arrived in California with funds from Canada, that had been accumulated since my marriage, my wife and I considered that each of us owned one-half of that at the time of our arrival in California.

(Testimony of David Gordon.)

When I came to California the property was in the form of cash or securities, all personal property. I now have a very small percentage of what I then had. I think I had less in 1928 than I had when I came to California, I do not know the exact amount but I think I had less.

I do not remember what kind of returns I filed for the years prior to 1928.

Whereupon counsel for the petitioner objected to the last question on the basis that information relative to years prior to 1928 was immaterial, in view of the fact that the only year in issue was 1928. The Board member ruled that the witness could answer.

I really do not remember about the years prior to 1928 but I know that in earlier years I had filed single returns. By a single return I mean one single return for my wife and myself. I am not sure what year it was when we started to file separate returns. As a matter of fact I did not know the proper way to do it at all because I was inexperienced in that and I had just [21] a simple bookkeeper that made it out for me. I do not recall the kind of a split in income that was made on the returns for 1928. I do not remember anything as to that. At that time I had an auditor. I do not recall whether or not I had any income from services, as distinguished from income on investments, during the year 1928. I don't remember what the return is at all or what it was at that time. I identify the signature on the 1928 return you are showing me as mine. I think that the signature on the other 1928 return you are show-

(Testimony of David Gordon.)

ing me is that of my wife, Lillian Gordon. I didn't say that my property in 1928 was less than when I came from Canada, I don't know. I don't remember. I believe it was but I don't remember anything at all about what my wealth was at that time.

Whereupon the witness was asked to look at two income tax returns offered him in order that he might refresh his memory and state whether or not the income reported on the two returns was equally divided. Counsel for the petitioner pointed out that the documents speak for themselves. No objection to the question was made to the Board member.

My memory is very poor. I only went to school until I was 12 years old and I really am not competent to know. I started early to work and I really don't know. When it comes to this sort of thing I have got to have some one else do it for me. If the income is not equally divided I think that would be the fault of the auditor because the auditor's instructions were right. The auditor works for the Fox Studio now and he does auditing on the side. I think that certain things should be followed, certain rules should be followed, and that is the reason possibly why they are not made exactly half and half. The instructions to him were that they [22] were to be divided up, that she was an equal partner. I never had any separate property other than—

Whereupon counsel for the petitioner objected to the last question on the ground that it was calling

(Testimony of David Gordon.)

for a legal conclusion of the witness. The Board member ruled that the answer could stand.

I stated that I came directly to California, from Canada, about 12 years ago. I did not have any income at that time. I had a business going in Montreal and I was in the process of breaking it up, and naturally taking losses the first year or two until I became domiciled here. That was 10 or 12 years ago. It took me almost two years to break up the proposition and I was taking losses due to the exchange situation, bringing my funds into this district. I know, for instance, that we sold stuff that cost us $30,000 for $5,000 or $6,000, something like that. We were not making any money the first two years. I was taking actual losses in breaking it up.

I don't remember the amount I brought from Canada but I know it was a considerable sum of money. I was getting in funds all the time. I had accounts and things in Montreal. Some of them, most of them, were honorable and then others would take advantage of the fact that I was breaking up. It was more than $100,000. I should say it was more than $200,000 but I don't remember. Not all at one shot, of course, but through the years, it was all coming, in the course of a few years, from Canadian sources. Every time I would bring in Canadian money I would lose, on exchange, any where from 15 to 20 or 30 per cent. The exchange was very low at that time. I would like to have 10 per cent now of what I brought. I will sell property that I still have for 10 per cent of what it cost me, and some

(Testimony of David Gordon.)

of it [23] for 5 per cent, and I have had it for 6 or 8 years. At one time I thought it was worth a lot of money but now I know it is not worth a lot of money, and that was my assets. I am now pretty close to being broke but I have a little left.

I was in Canada from childhood to manhood. I raised my children there. I was born in the United States and when I was 9 months old my folks emigrated to Canada and my father became a British subject. I never did become a British subject.

I always found it best to run my business in my own name because otherwise it would have been a complicated and dragged out affair and my wife would have to stay always around the office. She had couple of children to look after and naturally I run the business in my own name. The property was not always held in my name. Often, for convenience if she would be away or if she was ill we would put it into a trust. But, mostly it was held as just ordinary property, as it was bought.

The bank accounts were held in my name. My wife has been away now for six months. She just returned. If it was in both our names, why we could not—well, she just came home from Montreal now.

My ventures here in California require the use of very little credit. I do not remember that I have ever given a financial statement. I have not given one for 7 or 8 years, anyhow. I do not think I have given any. I can not remember whether I really ever have but I doubt whether I have. I am not positive.

(Testimony of David Gordon.)

I feel positive that I have not given it within the last five or six or seven years.

In the earning of income my wife performed office duties. In Canada she was in the office pretty nearly every day. Whenever I had to go away on buying trips she ran the business. Even now when I go away [24] she transacts everything and naturally she is the mother of two children and she looks after the children.

The business in Canada was a clothing business. We manufactured boys' and children's clothing. In California I have not been in any business except real estate and things of that nature. I dealt in stocks and securities here. I dealt through brokers but did not have to show my credit standing because the broker, you have to give him the money or he won't give you the stock.

Occasionally I maintained a real estate office in California. I have not had one for the last four or five years because there has been no business.

I had agreements with my wife, relative to the ownership of property, after we came to California. She would feel insulted if I told her she did not own one-half of what I had. Every transaction I made of any importance, that involved money, I could not do unless I got her agreement to it and if she wanted to help her relatives out she does not say "will you?" but she says "give it to them" and that is hers if I have it to give.

My wife was around the factory office in Canada approximately every day. She was around the real

(Testimony of David Gordon.)

estate office also but she had her family to look after principally since that.

Several years ago I told the auditor who made my income tax returns "you are wrong we ought to file separate returns" and he said "well, the law would not stand for it", and I told him "you are wrong, why don't other people do it?" When it comes to figures and things I am not an expert. The returns were made according to the conception of the auditor of what the law demanded. [25]

Counsel for respondent offered in evidence copies of the 1928 separate income tax returns of David Gordon and his wife, Lillian Gordon, which were accepted and marked Respondent's Exhibits A and B respectively (photostatic copies of each to be furnished and made a part of this record).

The foregoing is the substance of all the evidence adduced at the trial of said proceeding.

FRED HOROWITZ,
Counsel for Petitioner.

(Sgd) ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Approved and ordered filed this 28th day of Apr. 1934.

(Signed) ERNEST H. VAN FOSSAN,
Member.

[Endorsed]: United States Board of Tax Appeals. Filed Apr. 28, 1934. [26]

Form 1040
U. S. Internal Revenue

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
OR INCOMES, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1928

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1929

(PRINT NAME AND ADDRESS PLAINLY BELOW)

Lillian G ordon
629 So. June Street
Los Angeles, California

Occupation, Profession, or Business

Do Not Write in These Spaces

File Cab. 147
Serial Number 309454

RECEIVED WITH REMITTANCE
MAR 15 1929
Int. Rev.

GOV. RECEIPT
TAX $ 439.39
INTEREST
PENALTY
CLAIM NO.
DATE OF CLR. 1/26/31
ASSISTED BY
DEP. AK SEC. E UNIT 1
DATE 3/9/31
REMD. CC BY
INITIAL

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1927, to what Collector's office was it sent? No
3. Is this a joint return of husband and wife? No
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent David Gordon 6th Calif.
5. Were you married and living with husband or wife on the last day of your taxable year? Yes
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change No
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? Two

INCOME	Amount received	Exclusions (Explain in Schedule A)	
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received)			
2. Income from Business or Profession. (From Schedule A)			
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source)	See Schedule F.		1385.62
(a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source	Community 1/2		1925.00
4. Income from Partnerships. (State name and address)			
(a) Income from Fiduciaries. (State name and address)			
5. Rents and Royalties. (From Schedule B)			7008.40
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			8649.52
7. Dividends on Stock of Domestic Corporations	Community 1/2		3922.87
8. Taxable Interest on Liberty Bonds, etc. (From Schedule E)			
9. Other Income (including dividends received on stock of foreign corporations). (State nature of income) (a)			
(b)			
10. TOTAL INCOME IN ITEMS 1 TO 9			$ 21 901.41
DEDUCTIONS			
11. Interest Paid		$	3363.01
12. Taxes Paid. (Explain in Schedule F)	County Taxes Only		2816.44
13. Losses by Fire, Storm, etc. (Explain in Table on page 2)			
14. Bad Debts. (Explain in Schedule F)			
15. Contributions. (Explain in Schedule F)			
16. Other Deductions Authorized by Law. (Explain in Schedule F)			
17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16			$ 6 179.45
18. NET INCOME (Item 10 minus Item 17)			$ 15 721.96

OFFICE AUDIT
INTERNAL REVENUE AGENT

U.S. BOARD OF TAX APPEALS
Dkt 9 15499
SEP
EXH. A
RESPONDENT'S

EARNED INCOME CREDIT

19. Earned Net Income (not over $30,000)	$6000.00	
20. Less Personal Exemption and Credit for Dependents (see Instruction 20)		
21. Balance (Item 19 minus Item 20)	$6000.00	
22. Amount taxable at 1½% (not over the first $4,000 of Item 21)	$4000.00	
23. Amount taxable at 3% (not over the second $4,000 of Item 21)	1000.00	
24. Amount taxable at 5% (balance over $8,000 of Item 21)		
25. Normal Tax (1½% of Item 22)		$ 60.00
26. Normal Tax (3% of Item 23)		30.00
27. Normal Tax (5% of Item 24)		
28. Surtax on Item 19 (see Instruction 21)		
29. Tax on Earned Net Income (total of Items 25, 26, 27, and 28)		$ 90.00
30. Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44)		$ 22.50

COMPUTATION OF TAX (See Instruction 21)

31. Net Income (Item 18 above)		15721.96
32. Less Dividends (Item 7 above)	$ 3922.87	
33. Interest on Liberty Bonds, etc. (Item 8)		
34. Credit for Dependents		
35. Personal Exemption		3922.87
36. Total of Items 32, 33, 34, and 35		
37. Balance (Item 31 minus Item 36)		12799.09
38. Amount taxable at 1½% (not over the first $4,000 of Item 37)		4000.00
39. Balance (Item 37 minus Item 38)		$ 8799.09
40. Amount taxable at 3% (not over the second $4,000 of Item 37)		4000.00
41. Amount taxable at 5% (balance over $8,000 of Item 37)		$ 4799.09

42. Normal Tax (1½% of Item 38)	$ 60.00
43. Normal Tax (3% of Item 40)	120.00
44. Normal Tax (5% of Item 41)	239.95
45. Surtax on Item 18 (see Instruction 21)	74.44
46. Tax on Net Income (total of Items 42, 43, 44, and 45)	$ 494.39
47. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D)	
48. Total of or difference between Items 46 and 47	$ 494.39
49. Less Credit of 25% of Tax on Earned Net Income (Item 30)	22.50
50. Total Tax (Item 48 minus Item 49)	$ 471.89
51. Less Income Tax Paid at Source	38.50
52. Income and Profits Taxes paid to a foreign country or U. S. possession	
53. Balance of Tax (Item 50 minus Items 51 and 52)	$ 433.39

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1928, and the Regulations issued under authority thereof.

(If return is made by agent, the name of taxpayer must be stated on this line)

Sworn to and subscribed before me this 4th day of March, 1929.

Lillian Gordon
(Signature of taxpayer or agent)

NOTARIAL SEAL

Mortimer A. Stimmann Notary Public
(Signature of officer administering oath) (Title)

629 So June St
(Address of agent)

Los Angeles Cal
(Address of agent)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 7)

1. Total receipts from business or profession (state kind of business) $

Cost of Goods Sold

2. Labor $
3. Material and supplies
4. Merchandise bought for sale
5. Other costs (itemize below or on separate sheet)
6. Plus inventory at beginning of year
7. Total (Lines 2 to 6, inclusive) $
8. Less inventory at end of year
9. Net Cost of Goods Sold (Line 7 minus Line 8) $

Note.—Enter "C" or "CM" on Lines 8 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Other Business Deductions

10. Salaries, exclusive of "Labor," reported on Line 2 (Do not deduct compensation for your own services) $
11. Interest on business indebtedness to others
12. Taxes on business and business property
13. Losses (explain in table provided thereafter at foot of page)
14. Bad debts arising from sales or services
15. Depreciation, obsolescence, and depletion (explain in table provided thereafter at foot of page)
16. Rents, repairs, and other expenses (itemized below or on separate sheet)
17. Total (Lines 10 to 16, inclusive) $
18. Total Deductions (Line 9 plus Line 17) $
19. Net Profit (Line 1 minus Line 18) (Enter as Item 3) $

Explanation of deductions claimed on Lines 8 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. Kind of Property	2. Amount Received	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Explain in table at foot of page)	6. Repairs	7. Other Expenses (Itemize below)	8. Net Profit (Enter as Item 4)
3200 - 3210 W. 8th St.	$ 18900.00	$ 104000.00		$ 2600.00	Joint Tenancy 1/2	$ 283.20 Insur.	7008.40
Included in 1992 Ins.		Bldgs. only					

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowable Since Acquisition	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 6)
Stocks & Bonds	1928	$ 920402.80		$ 903103.76	Community 1/2		$ 8649.52

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Amount Received	5. Depreciation Allowable Since Acquisition	5. Cost	7. Value as of March 1, 1913	8. Subsequent Improvements and Capital Deductions	9. Net Gain or Loss (Enter 12½% as Item 6)
	Mo. Day Year	Mo. Day Year	$	$	$	$	$	$

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. Obligations or Securities	2. Interest Received or Accrued	3. Amount Owned	4. Principal Amount Exempt From Taxation	5. Amount Owned in Excess of Exemption	6. Interest on Amount in Excess of Exemption (Enter as Item 5)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	xxxxxx	xxxxxx
(b) Securities issued under Federal Farm Loan Act, or under such Act as Amended			All	xxxxxx	xxxxxx
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States			All	xxxxxx	xxxxxx
(d) Liberty 4% and 4¼% Bonds, Treasury 3½%, 3¾%, 4%, and 4¼% Bonds, Treasury Certificates of Indebtedness, and Treasury Savings Certificates			$5,000	$	$
(e) Treasury Notes			None		

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

Item 3 Interest Received - Mortgages and Trust Deeds

William Hawkins	(Community 1/2	120.00)	
D. L. Hiam	" "	205.62)	Property Acquired Since
Carl Laemmle	" "	336.00)	July 1927
W. A. Paris	" "	735.00)	
		1395.62	

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost (Exclusive of Land)	6. Value as of March 1, 1913 (Exclusive of Land)	Amount of Depreciation Charged Off 7. Previous years	8. This year
				$	$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Allowable Since Acquisition	7. Insurance and Salvage Value	8. Deductible Loss
		$	$	$	$	$	$

5—14999

Form 1040
U. S. Internal Revenue

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
OR INCOMES, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1928

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1929

Do Not Write in This Space

File No. 143

Serial Number 309453

RECEIVED WITH REMITTANCE MAR 15 1929 1st Rev. Dist. of Calif.

$ 790.00

Cashier's Check or Certificate

Amount

(PRINT NAME AND ADDRESS PLAINLY BELOW)

David Gordon
(Name)

629 So. June St.
(Street and number, or rural route)

Los Angeles, California
(Post office) (County) (State)

Occupation, Profession, or Business: Retired

Form 1040 ... (Calendar Year) ... OR FISCAL YEAR ENDING ... 19..

IF ABSENT ...

... 2614.50

... $ ...

... A ...

... 14 ...

Parent Co ...

Basic OA or BAR 1/24/34

Audited by BAB

Unit No. E1 Date 3/9/32

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1927, to what Collector's office was it sent? 6th Calif
3. Is this a joint return of husband and wife? No
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent: 6th Calif. Lillian Gordon
5. Were you married and living with husband or wife on the last day of your taxable year? Yes
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. No
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? 0

INCOME

	Amount received	Expenses paid (Explain in Schedule F)		
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received)	$	$		
OFFICE AUDIT				
2. Income from Business or Profession. (From Schedule A)				
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source) see attached schedule			3905.63	
(a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source Community 1/2			1925.00	
4. Income from Partnerships. (State name and address)				
(a) Income from Fiduciaries. (State name and address)				
5. Rents and Royalties. (From Schedule B)			7308.40	
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			28574.83	
7. Dividends on Stock of Domestic Corporations Community 1/2			2922.88	
8. Taxable Interest on Liberty Bonds, etc. (From Schedule E)				
9. Other Income (including dividends received on stock of foreign corporations). (State nature of income)				
(a) Hugh Evans Inc. Tract			984.00	
(b)				
10. Total Income in Items 1 to 9				$ 45 820.74

U.S. BOARD OF TAX APPEALS DIV. 9 Docket No. 5149 SEP 20 1930 Petitioner's EXHIBIT B

RECEIVED AUG 18 1929 INTERNAL REVENUE AGENT'S BRANCH

DEDUCTIONS

11. Interest Paid	$ 9588.01	
12. Taxes Paid. (Explain in Schedule F) County Taxes Only	3643.92	
13. Losses by Fire, Storm, etc. (Explain in Table on page 2)		
14. Bad Debts. (Explain in Schedule F)		
15. Contributions. (Explain in Schedule F)	640.50	
16. Other Deductions Authorized by Law. (Explain in Schedule F)	3903.75	
17. Total Deductions in Items 11 to 16		$ 17 776.18
18. Net Income (Item 10 minus Item 17)		$ 27 844.56

EARNED INCOME CREDIT

19. Earned Net Income (not over $30,000)	$ 5000.00	
20. Less Personal Exemption and Credit for Dependents (see Instruction 20)	4300.00	
21. Balance (Item 19 minus Item 20)	$ 700.00	
22. Amount taxable at 1½% (not over the first $4,000 of Item 21)	$ 700.00	
23. Amount taxable at 3% (not over the second $4,000 of Item 21)		
24. Amount taxable at 5% (balance over $8,000 of Item 21)		
25. Normal Tax (1½% of Item 22)	$ 10.50	
26. Normal Tax (3% of Item 23)		
27. Normal Tax (5% of Item 24)		
28. Surtax on Item 19 (see Instruction 21)		
29. Tax on Earned Net Income (total of Items 25, 26, 27, and 28)	$ 10.50	
30. Credit of 25% of Item 29 (not over 25% of Items 28, 42, 43, and 44)	$ 2.63	

COMPUTATION OF TAX (See Instruction 21)

31. Net Income (Item 18 above)		$ 27844.56		
32. Less Dividends (Item 7 above)	$ 2922.88			
33. Interest on Liberty Bonds, etc. (Item 8)				
34. Credit for Dependents	800.00			
35. Personal Exemption	3500.00			
36. Total of Items 32, 33, 34, and 35		7222.88		
37. Balance (Item 31 minus Item 36)		$ 20621.68		
38. Amount taxable at 1½% (not over the first $4,000 of Item 37)		4000.00		
39. Balance (Item 37 minus Item 38)		$ 16621.68		
40. Amount taxable at 3% (not over the second $4,000 of Item 37)		4000.00		
41. Amount taxable at 5% (balance over $8,000 of Item 37)		$ 12621.68		
42. Normal Tax (1½% of Item 38)			$ 60.00	
42. Normal Tax (3% of Item 40)			120.00	
44. Normal Tax (5% of Item 41)			631.08	
45. Surtax on Item 18 (see Instruction 21)			709.12	
46. Tax on Net Income (total of Items 42, 43, 44, and 45)			$ 1520.20	
47. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D)				
48. Total of or difference between Items 46 and 47			$ 1520.20	
49. Less Credit of 25% of Tax on Earned Net Income (Item 30)			2.63	
50. Total Tax (Item 48 minus Item 49)			$ 1517.57	
51. Less Income Tax Paid at Source			38.50	
52. Income and Profits Taxes paid to foreign country or U. S. possession			1479.07	
53. Balance of Tax (Item 50 minus Items 51 and 52)			$	

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1928, and the Regulations issued under authority thereof.

(If return is made by agent, the person therefor must be stated on this line)

David Gordon
(Signature of taxpayer)

Sworn to and subscribed before me this 4th day of March, 1929.

629 So June St
(Address of taxpayer)

Los Angeles Calif
(Address of agent)

NOTARIAL SEAL

Mortimer A Stimmerson Notary Public
(Signature of officer administering oath) (Title)

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 3)

1. Total receipts from business or profession (state kind of business)

Cost or Gross Sold		Gross Business Deductions	
2. Labor		10. Salaries, exclusive of "Labor," reported on Line 2 (Do not deduct compensation for your own services)	
3. Material and supplies		11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (Itemize below or on separate sheet)		13. Losses (explain in table provided therefor at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales or services	
7. TOTAL (Lines 2 to 6, inclusive)		15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page)	
8. Less inventory at end of year		16. Rent, repairs, and other expenses (Itemized below or on separate sheet)	
9. NET COST OF GOODS SOLD (Line 7 minus Line 8)		17. TOTAL (Lines 10 to 16, inclusive)	
		18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
		19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 9)	

NOTE.—Enter "C" or "CM" on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 8 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST	4. VALUE AS OF MARCH 1, 1913	5. DEPRECIATION (Deduct in cases to which it applies)	6. REMARKS	7. OTHER EXPENSES (Itemize below)	8. NET PROFIT (Enter as Item 9)
3200 3210 W. 8th St. Duplex	$16900.00	$104000.00 Bldg. only		$ 2600.00	Joint Tenancy 1/2	$ 293.20 Insur.	$ 2006.40
8th & Kingsley Separate	600.00	12000.00		300.00			300.00
							2306.40

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. DEPRECIATION ALLOWABLE SINCE ACQUISITION	5. COST	6. VALUE AS OF MARCH 1, 1913	7. SUBSEQUENT IMPROVEMENTS	8. NET PROFIT (Enter as Item 9)
		$	$	$	$	$	$

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

1. KIND OF PROPERTY	2. DATE ACQUIRED Mo. Day Year	3. DATE SOLD Mo. Day Year	4. AMOUNT RECEIVED	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. COST	7. VALUE AS OF MARCH 1, 1913	8. SUBSEQUENT IMPROVEMENTS, AND CAPITAL DEDUCTIONS	9. NET GAIN OR LOSS (Enter 12½% of Item 9)
			$	$	$	$	$	$

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. OBLIGATIONS OR SECURITIES	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. PRINCIPAL AMOUNT EXEMPT FROM TAXATION	5. AMOUNT OWNED IN EXCESS OF EXEMPTIONS	6. INTEREST ON AMOUNT IN EXCESS OF EXEMPTION (Enter as Item 6)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	XXXXXXX	XXXXXXX
(b) Securities issued under Federal Farm Loan Act, or under such Act as Amended			All	XXXXXXX	XXXXXXX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States			All	XXXXXXX	XXXXXXX
(d) Liberty 4% and 4½% Bonds, Treasury 3½%, 3¾%, 4%, and 4¼% Bonds, Treasury Certificates of Indebtedness, and Treasury Savings Certificates			$5,000	$	$
(e) Treasury Notes			None		

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

Commission Paid on Real Estate Sales in Schedule C	3693.75
Escrow Expenses " " " " " " "	210.00
	3903.75

Lot 65-3-4 pro-rate

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY (If buildings, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. PROBABLE LIFE AFTER ACQUIREMENT	5. COST (Exclusive of Land)	6. VALUE AS OF MARCH 1, 1913 (Exclusive of Land)	AMOUNT OF DEPRECIATION CLAIMED ON 7. Previous years	AMOUNT OF DEPRECIATION CLAIMED ON 8. This year
3200 -3210 W. 8th St.	1926	New	40 yrs	104000.00		2600.00	2600.00
8th & Kingsley	1926	"	40 yrs	12000.00		300.00	300.00

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST	4. VALUE AS OF MARCH 1, 1913	5. SUBSEQUENT IMPROVEMENTS	6. DEPRECIATION ALLOWABLE SINCE ACQUISITION	7. INSURANCE AND SALVAGE VALUE	8. DEDUCTIBLE LOSS
		$	$	$	$	$	$

ITEM #3 INTEREST RECEIVED ON MORTGAGES AND TRUST DEEDS

Max Zimmon	480.00	
Solomon and William Hawkins (Community 1/2)	2030.00	
D. L. Hiam	120.00	Property acquired since July 1927
Carl Laemmle	205.63	
W. A. Faris	335.00	
	735.00	
	3905.63	

SCHEDULE C - PROFIT FROM SALE OF REAL ESTATE ETC.

	Sold	Sale Price	Cost	Gross Profit	AMT REC'D. 1928		1928 Gain or Loss
Lot - 8th & Harcourt vacant	1925	15000.00	13500.00	1500.00	8 500.00		850.00
Lot - Wilshire Blvd. & Hamlin Ave. (1/2 interest)	1925	11800.00	5500.00	6300.00	2450.00		1307.81
Lot 5 Tract 6749 not subdivision	1927	6000.00	2750.00	3250.00	1500.00		812.50
Lot 6-7-8 Tract 6749	1927	13000.00	5350.00	7650.00	2600.00	1530.10	1530.00
Lease and Furniture	1927	20000.00	12000.00	8000.00	5000.00		2000.00
Lot 652-3-4 Tract 4988 (1/2 interest)	1928	97500000	23500.00	74000.00	19000.00	1/2 int.	7215.00
Lot - Vermont and 1st St.	1928	37500.00	31000.00	6500.00	900.00	1000.	1560.00
Lot 394 - Wilshire Vista Tract #5798 (1/2 interest)	1928	70000.00	23500.00	46500.00	14000.00	1/2 int.	4650.00
Stocks and Bonds Bought and sold 1928	1928	920402.80	903103.76	Community 1/2			8649.[illegible]
							28574.83

bought on margin

Land + Bldgs not separated

1957.81

a 2

Schedule F—Contributions

Cong, Sinai	295.00
Home for Incurables	50.00
Zionist organ of Amer.	6.00
Congregation B'nai Brith	30.00
Community Chest	100.00
General Orphans Home for Girls	10.00
Federation Jewish Welfare	100.00
Nathan Straus Palestine Fd.	20.00
Convalescent Home	5.00
Temple B'nai Brith Sisterhood	3.25
Sinai Sisterhood	6.25
L. A. T. B. Assn.	5.00
United Charities of Jerusalem	10.00
	640.50

A 3 [32]

Form 7544—Revised Dec. 1928

Treasury Department
Bureau of Internal Revenue
Income Tax Unit

Notice of Return Filed for 1928

This form, when prepared, must be addressed to Commissioner of Internal Revenue, Sorting Section, Washington, D. C. Do not inclose with other matter to be forwarded to the Commissioner.

Distric

DAVID GORDON
629 S JUNE ST 6th CALIFORNIA
LOS ANGELES CALIF 309453 A 4 [33]

Form 1099—U. S. Internal Revenue
Names Must Be Legibly Typed or Printed.

INFORMATION RETURN FOR CALENDAR YEAR 1928

To be used for reporting payments of dividends made to the shareholders who were paid $500 or more each during the year, and payments of salaries, or other determinable income of $1,500 or more to a single person, or $3,500 or more to a married person.

BY WHOM PAID

Name—California Bank, 625 So Spring
Address—Los Angeles, Cal.

Instructions to Payors

Prepare one of these forms for each citizen or resident of the United States (individual or fiduciary), or a domestic or resident partnership to whom income, as described above, was paid during the calendar year 1928. In case the marital status of an individual is unknown, prepare this form if the payment of salary, etc., amounts to $1,500 or more.

Dividend payments of $500 or more made during the year to a nonresident alien shall be reported on this form.

Forward with return Form 1096 so as to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before March 15, 1929.

For Further Instructions See Form 1096

TO WHOM PAID

Name—David Gordon
Street—629 S. June St.
City—Los Angeles State—California

Kind of Income Paid	Amount Paid
Salaries, wages, fees, commissions, etc.	$
Interest on notes, mortgages, etc.	
Rents and royalties	
Dividends	874 75
Other income, including foreign items	

A 5 [34]

Form 1099—U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

INFORMATION RETURN FOR CALENDAR YEAR 1928

To be used for reporting payments of dividends made to shareholders who were paid $500 or more each during the year, and payments of salaries, or other determinable income of $1,500 or more to a single person, or $3,500 or more to a married person.

BY WHOM PAID

Name—Los Angeles-First Nat'l Tr. & Sav. Bank,
Address—Seventh & Spring Sts.,
Los Angeles, Calif.

Instructions to Payors

Prepare one of these forms for each citizen or resident of the United States (individual or fiduciary), or a domestic or resident partnership to whom income, as described above, was paid during the cal-

endar year 1928. In case the marital status of an individual is unknown, prepare this form if the payment of salary, etc., amounts to $1,500 or more.

Dividend payments of $500 or more made during the year to a nonresident alien shall be reported on this form.

Forward with return Form 1096 so as to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before March 15, 1929.

For Further Instructions See Form 1096

TO WHOM PAID

Name—David Gordon
Street—629 So. June St.
City—Los Angeles State—Calif.

Kind of Income Paid	Amount Paid
Salaries, wages, fees, commissions, etc.	$
Interest on notes, mortgages, etc.	
Rents and royalties	
Dividends	1217.44
Other income, including foreign items	

A 6 [35]

Form 1099—U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

INFORMATION RETURN FOR CALENDAR YEAR 1928

To be used for reporting payments of dividends made to shareholders who were paid $500 or more each during the year, and payments of salaries, or other determinable income of $1,500 or more to a single person, or $3,500 or more to a married person.

BY WHOM PAID

Name—Head Office Security Trust & Savings Bank
Address—5th and Spring Sts
Los Angeles, Calif.

Instructions to Payors

Prepare one of these forms for each citizen or resident of the United States (individual or fiduciary), or a domestic or resident partnership to whom income, as described above, was paid during the calendar year 1928. In case the marital status of an individual is unknown, prepare this form if the payment of salary, etc., amounts to $1,500 or more.

Dividend payments of $500 or more made during the year to a nonresident alien shall be reported on this form.

Forward with return Form 1096 so as to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before March 15, 1929.

For Further Instructions See Form 1096

TO WHOM PAID

Name—David Gordon
Street—629 So. June St.
City—Los Angeles State—Calif.

Kind of Income Paid	Amount Paid
Salaries, wages, fees, commissions, etc.	$
Interest on notes, mortgages, etc	
Rents and royalties	
Dividends	1,930.
Other income, including foreign items	

Form 1099—U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

INFORMATION RETURN FOR CALENDAR YEAR 1928

To be used for reporting payments of dividends made to shareholders who were paid $500 or more each during the year, and payments of salaries, or other determinable income of $1,500 or more to a single person, or $3,500 or more to a married person.

BY WHOM PAID

Name—Emil Schepp
Address—Traymore Hotel 8th St. at
Fedora, Los Angeles, Calif.

Instructions to Payors

Prepare one of these forms for each citizen or resident of the United States (individual or fiduciary), or a domestic or resident partnership to whom income, as described above, was paid during the calendar year 1928. In case the marital status of an individual is unknown, prepare this form if the payment of salary, etc., amounts to $1,500 or more.

Dividend payments of $500 or more made during the year to a nonresident alien shall be reported on this form.

Forward with return Form 1096 so as to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before March 15, 1929.

For Further Instructions See Form 1096

TO WHOM PAID

Name—David Gordon
Street—629 So. June St.
City—Los Angeles State—Calif.

Kind of Income Paid	Amount Paid
Salaries, wages, fees, commissions, etc....	$.....
Interest on notes, mortgages, etc.....	.....
Rents	9180 00
Dividends	.....
Other income, including foreign items.....	.....

A 8 [37]

Form 1000—Revised March, 1926
U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

OWNERSHIP CERTIFICATE—INTEREST ON BONDS

and other similar obligations of domestic and resident corporations (exemption not claimed)

Debtor Organization

Name—Paramount Famous Players Lasky
Address .....

.....

Due date—6-2-28 Date paid—June 20, 1928.

I certify that the owner of the bonds from which the interest entered herein was derived falls within the class of persons or organizations opposite which such interest is entered.

Signature of Owner,
Trustee, or Agent

David Gordon

Address of Trustee or Agent:

Owner of Bonds (Give name in full)

Name—David Gordon

Street .....

City..... State.....

Owner		With tax-free covenant	Without tax-free covenant
Citizen or Resident of U.S.:	2%	....	....
1. Individual, fiduciary, or partnership	$.....	90	(No certificate required)
Nonresident Alien:	2%		5%
2. Individual, fiduciary, or partnership	$.....	....	$..... ....
3. Corporation, having no office or place of business in U. S.....	2%		13½%
	$.....	....	$..... ....
	2%		5%
4. Unknown	$.....	....	....

A 9 [38]

Form 1000—Revised March, 1926
U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

OWNERSHIP CERTIFICATE—INTERST ON BONDS

and other similar obligations of domestic and resident corporations (exemption not claimed)

Debtor Organization

Name—Porto Rican [illegible]
Address—The National City Bank of New York

.....

Due date—Jan., 1928 Date paid—G. H. Jan 13, 1928

I certify that the owner of the bonds from which the interest entered herein was derived falls within the class of persons or organizations opposite which such interest is entered.

Signature of Owner,
Trustee, or Agent

DAVID GORDON

Address of Trustee or Agent—L. A.

Owner of Bonds (Give name in full)

Name—David Gordon
Street—629 So. June
City—L. A. State—Calif.

Owner	With tax-free covenant	Without tax-free covenant
Citizen or Resident of U.S.: 2%	.....	.....
1. Individual, fiduciary, or partnership	$..... 30	(No certificate required)

Nonresident Alien:	2%	5%
2. Individual, fiduciary, or partnership	$.....	$.....
3. Corporation, having no office or place of business in U. S.	2% $.....	13½% $.....
	2%	5%
4. Unknown	$.....	$.....

A 10 [39]

Form 1000—Revised March, 1926
U. S. Internal Revenue
Names Must Be Legibly Typed or Printed

OWNERSHIP CERTIFICATE—INTEREST ON BONDS

and other similar obligations of domestic and resident corporations (exemption not claimed)

Debtor Organization

Name—North American Edison Co.

Address .....

5-1957

Date due—Sept. 1928 Date paid.....

I certify that the owner of the bonds from which the interest entered herein was derived falls within the class of person or organizations opposite which such interest is entered.

Signature of Owner
Trustee, or Agent

E. F. HUTTON & CO.,
T. A. Lane, Partner.

Address of Trustee or Agent—61 Bway, N. Y. City

Owner of Bonds (Give name in full)

Name—D. Gordon
Street—629 S. June St.
City—Los Angeles State—Calif.

Owner	With tax-free covenant	Without tax-free covenant
Citizen or Resident of U.S.:	2%	
1. Individual, fiduciary, or partnership	$ 50	(No certificate required)
Nonresident Alien:	2%	5%
2. Individual, fiduciary, or partnership	$	$
3. Corporation, having no office or place of business in U. S.	$	$
	2%	5%
4. Unknown	$	

A 11 [40]

Treasury Department—Internal Revenue Bureau
Form 7872—Jan., 1926

INTEREST PAID ON REFUND OR CREDIT OF INCOME TAX

Auditor will definitely ascertain that the amount of interest shown hereon has been included in taxable income for the year in which received.

Schedule No. IT—30872
Date Check mailed—Sep. 8, 1928.

Charge Record

Return charged to.....

.....

Date ....., 192

Name—Mr. David Gordon
Street—629 South June St.
Street—Los Angeles State—Cal. Dist.—6-Cal.

Amount Refunded	Amount Credited	Interest Paid
$.....	$1530.16	$159.02

Note.—This certificate must be stapled or securely pinned to the return and not removed therefrom. A-12 [41]

United States Board of Tax Appeals.
Docket No. 54949

DAVID GORDON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR THE RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the Circuit Court of Appeals of the United States for the Ninth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and submitted as required by law and by the rules of said Court, and to include in said transcript of record

the following documents or certified copies thereof, to-wit:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled cause.
2. Pleadings before the Board of Tax Appeals as follows: [42]
   (a) Petition for redetermination.
   (b) Answer of the Respondent.
3. Opinion and decision of the Board.
4. Petition for review.
5. Order of the Board enlarging time for settlement of the evidence and transmission and delivery of the record on the petition for review, not included in record.
6. Statement of Evidence as settled.
7. This Praecipe.

FRED HOROWITZ,
Attorney for Petitioner.

[Endorsed]: United States Board of Tax Appeals. Filed April 27, 1934. [43]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 43, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 8th day of May, 1934.

(Seal) B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 7484. United States Circuit Court of Appeals for the Ninth Circuit. David Gordon, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 23, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7484.

United States
Circuit Court of Appeals
For the Ninth Circuit.

David Gordon,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONER'S OPENING BRIEF.

FRED HOROWITZ,
Union Bank Bldg., 8th and Hill, Los Angeles,
Attorney for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 7484.

United States
Circuit Court of Appeals
For the Ninth Circuit.

David Gordon,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT OF THE CASE.

The Commissioner of Internal Revenue determined a deficiency of Twenty-six Hundred Fourteen Dollars ($2614.00) in petitioner's payment of income tax for the year 1928, and on appeal to the Board of Tax Appeals this determination was upheld by an order of the Board entered November 24, 1933.

Petitioner and his wife filed separate returns for the tax year in question, in which returns their income was divided unequally. The Commissioner denied the propriety of any division of income and arrived at the claimed deficiency by taking as a tax basis the aggregate

of all income reported by petitioner and his wife, Lillian Gordon.

The evidence consists solely of the record, the testimony of the petitioner and the income tax returns of petitioner and his wife for the year 1928. Petitioner's testimony is substantially as follows: The income reported on the 1928 returns of himself and his wife was derived from real and personal property situate in California, acquired with the proceeds of the liquidation of a business formerly carried on by himself and his wife in Canada, the liquidation having been spread over a period of several years and completed about 1924; that such business was commenced shortly after petitioner's marriage to his present wife; that at the time of said marriage, he had no property of any kind, and that the original capital of the business was furnished by his wife, being funds given to her by her father at the time of the marriage; that at the time of the marriage an oral agreement was entered into between petitioner and his wife by which all property thereafter acquired by them or either of them was to be held by them in common and that this agreement was fully consummated and adhered to from the time of the marriage to the date of the hearing before the Board of Tax Appeals (September 26, 1933); that petitioner had an inadequate education, was inexperienced in income tax matters, and relied solely upon an auditor who was a simple bookkeeper, for the preparation of the income tax returns;

that the auditor was instructed, in the preparation of the returns in question, to divide the income equally between the petitioner and his wife.

Although the Board of Tax Appeals found that the property agreement was made as claimed by the petitioner, it held that there was no pleading or proof of the pertinent law of Canada, showing either (1) that community law obtains in Canada, or (2) that it might be superseded by agreement of the parties, or (3) that husband and wife are in Canada free to contract with each other with respect to property. In the absence of such pleading and proof, the Board held that it could not determine the ownership of the property either as acquired or at the time of removal to California, and, thus, not knowing the ownership of the property in Canada, it was impossible to determine what the status of the property would be in California, whether it was separate or joint or community property, or perchance fell in some other category. It was, therefore, held to be unnecessary to determine the efficacy in law of the so-called "fifty-fifty" agreement and that, lacking proof of essential facts, the Board had no alternative but to hold that the petitioner had not established that respondent was in error in determining the deficiency, and ordered that decision be entered for the respondent. This was done.

SPECIFICATION OF ERRORS.

The questions involved, all of which were raised by assignments of error in the petition for review, are as follows:

I. THE BOARD OF TAX APPEALS ERRED IN FAILING TO TAKE INTO ACCOUNT AS EVIDENCE THE PRESUMPTION THAT THE PERTINENT CANADIAN LAWS ARE THE SAME AS THE LAWS OF CALIFORNIA ON THE PARTICULAR SUBJECT INVOLVED.

II. THE BOARD OF TAX APPEALS ERRED IN FAILING TO GIVE EFFECT TO THE CONTRACT BETWEEN PETITIONER AND HIS WIFE WHICH CREATED A TENANCY IN COMMON AS TO ALL OF THEIR PROPERTY.

III. THE BOARD OF TAX APPEALS ERRED IN DETERMINING THAT ANY DEFICIENCY EXISTS.

IV. THE BOARD OF TAX APPEALS ERRED IN HOLDING THAT, UNDER THE EVIDENCE, THE WIFE OF PETITIONER HAD NO SEPARATE INTEREST IN THE AGGREGATE INCOME OF THE SPOUSES.

BRIEF OF THE ARGUMENT.

A. The Law of California Permits Husband and Wife Orally to Impress Upon Property Acquired by Either or Both, the Character of Common Property.

"Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on Trusts."

California Civil Code, Sec. 158.

"A husband and wife may hold property as joint tenants, tenants in common, or as community property."

California Civil Code, sec. 161.

The foregoing sections have been interpreted by the California courts to permit the spouses by informal contract to change the character of their property from community to separate property or *vice versa.*

"That a husband and wife may by contract change the character of their property from community to separate is well settled (*Perkins v. Sunset Tel. & Tel. Co.,* 155 Cal. 712; *Fay v. Fay,* 165 Cal. 469), likewise they may by contract transmute the separate property of either into community property. (*Yoakum v. Kingery,* 126 Cal. 30; *Carlson v. Carlson,* 10 Cal. App. 300.) No sound reason suggests itself why they may not accomplish the same purposes by contract made prior to and in anticipation of marriage. The law requires such contracts to be

in writing. Where the contract has been fully executed by one party, the case is taken out of the statute."

Martin v. Pritchard, 52 Cal. App. 720, 724.

Under the undisputed evidence here, petitioner and his wife entered into such an agreement at the time of their marriage by which all property thereafter acquired by either of them or both was to be transmuted into common property, and this agreement was renewed and adhered to when they came to California.

The law of California permitted and made effective the agreement thus renewed and regardless of the Canadian law on the subject, the agreement stands unimpaired.

B. Where the Foreign Law Is Neither Pleaded Nor Proved, the Law of the Forum Should Be Invoked.

In its memorandum opinion, the Board of Tax Appeals says:

"Petitioner failed either to plead or prove the pertinent law of Canada respecting title to property in Canada. We cannot assume it or take judicial notice of the same. Nor is quotation of such laws in the brief sufficient. The record fails to show that community property obtains in Canada, that it may be superseded by agreement of the parties, or even that husband and wife are free to contract with each other with respect to property. We are left in entire ignorance of the status or ownership of property in Canada.

"In this situation we cannot determine the ownership of the property either as acquired or at the time of removal to California. Thus, not knowing the ownership of the property in Canada it is impossible to determine what the status of the property would be in California, whether it was separate or joint or community property or perchance fell in some other category.

"It is therefore unnecessary to determine the efficacy in law of the so-called 'fifty-fifty' agreement." [Tr. p. 11, fol. 11.]

In support of its theory the Board of Tax Appeals quoted *Church v. Hubbart,* 2 Cranch 187, 236, and *Columbian Carbon Co.,* 25 B. T. A. 465.

In both cases the court refused to take notice of statutes of a foreign country not pleaded or proven. Neither case denied the familiar doctrine that where foreign laws are neither pleaded nor proven, the law of the forum will be invoked. This doctrine, however, was entirely ignored by the Board of Tax Appeals in the instant case. This universal rule is exemplified by the following citations from decisions of California courts:

"There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here; and it must, therefore, be assumed that the law with respect to those matters was the same there as in California. (*Norris v. Harris,* 15 Cal. 254; *Hickman v. Alpaugh,* 21 Cal. 226; *Hill v. Grigsby,* 32 Cal. 55; *Marsters v. Lash,* 61 Cal. 624; *Monroe v. Douglass,* 5 N. Y. 447; *Liverpool etc. Co. v. Phenix Ins. Co.,*

129 U. S. 445.) This rule applies to England as well as to sister states of the American nation. In *Liverpool etc. Co. v. Phenix Ins. Co.,* 129 U. S. 445, the supreme court of the United States says: 'The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.'"

Wickersham v. Johnston, 104 Cal. 407, 411.

"In Monroe v. Douglass, 1 Selden, 452, the Court of Appeals of New York, in referring to the laws of Scotland, which were supposed to apply to the controversy involved, but which were neither asserted or proved to be different from those of that State, used this language: 'It is a well settled rule, founded on reason and authority, that the *lex fori,* or, in other words, the laws of the country to whose Courts a party appeals for redress, furnish in all cases, *prima facie,* the rule of decision; and if either party wishes the benefit of a different rule or law, as, for instance, the *lex domicilii, lex loci contractus,* or *lex loci rei sitae,* he must aver and prove it. The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved, like other facts of which Courts do not take judicial notice, and the mode of proving them, whether they be written or unwritten, has been long established.' (See also as bearing more or less

directly on this and kindred questions, Arayo v. Currel, 1 Mill. La. 541; Crozier v. Hodge, 3 Id. 357; *Ex parte* Lafonta, 2 Rob. 495; Smoot v. Russel, 1 Mart. N. S. 522; Campbell v. Miller, 3 Id. 149; Harris v. Allnut, 12 La. 465; Greenwade v. Greenwade, 3 Dana, 75; Holmes v. Broughton, 10 Wend. 75; Abell v. Douglass, 4 Denio, 305; Thurston v. Percival, 1 Pick. 415; Crouch v. Hall, 15 Ill. 265; Titus v. Scantling, 4 Blackf. 90; Sheperd v. Nabors, 6 Ala. N. S. 637; Ellis v. White, 25 Id. 540.)"

Norris v. Harris, 15 Cal. 226, 254, 255.

C. The Contract Between Petitioner and His Wife Should Be Given Effect.

Hereinbefore we have demonstrated that a contract made in Canada and renewed in California upon arrival of the parties and fully executed by them, having for its purpose the creation of a tenancy in common as to the property of either or both, is and was lawful and effectual. The only testimony in the record is that of the petitioner.

"Prior to my marriage, we did not enter into a written prenuptial agreement but we discussed it several times that everything we made was 50-50. We did not enter into any agreement in writing. In Quebec a prenuptial agreement is usually entered into which is usually against the wife's interest in this way, that if a man would have property he would agree to give his wife—well, if he was worth a hundred thousand dollars he would agree to give his wife so much, and she would resign and waive all her community rights and her partnership rights. My wife was against anything of that nature and she said we would be 50-50. I did not enter into any

prenuptial agreement whereby my wife waived any rights in my property." [Tr. p. 17, fol. 19.]

* * * * * * * *

"The gist of the conversations with my wife was as follows:

"I could not, on any transaction that amounted to real money, do anything unless my wife agreed to it, because it was hers as much as mine.

"From the time of my marriage up to the present time, my practice with respect to either the purchase or sale of any properties has been that if the deal was advantageous to us both, and she objected to it, it wouldn't happen, that is all. It is the same right now.

"Whenever my wife wants any money, for any purpose at all, she just says 'get it' and that is all there is to it. My wife would feel highly insulted, and I would feel I was stealing it from her if I raised the question that she did not own one-half of my property, or tried to take any more than half of what was owned, in my own right, for my benefit.

"At the time when I arrived in California with funds from Canada that had been accumulated since my marriage, my wife and I considered that each of us owned one-half of that at the time of our arrival in California." [Tr. p. 18, fols. 19-20.]

* * * * * * * *

"In the earning of income my wife performed office duties. In Canada she was in the office pretty nearly every day. Whenever I had to go away on buying trips she ran the business. Even now when I go away she transacts everything and naturally she

is the mother of two children and she looks after the children." [Tr. p. 23, fols. 23-24.]

* * * * * * * *

"I had agreements with my wife, relative to the ownership of property, after we came to California. She would feel insulted if I told her she did not own one-half of what I had. Every transaction I made of any importance, that involved money, I could not do unless I got her agreement to it and if she wanted to help her relatives out she does not say 'will you?' but she says 'give it to them' and that is hers if I have it to give." [Tr. p. 23, fol. 24.]

This testimony is uncontradicted, and the pertinent finding of the Board of Tax Appeals is in accordance therewith. The finding follows:

"* * * After marriage petitioner and his wife agreed that everything was to be on a '50-50' basis. Petitioner and his wife took the $3,000 and started a small manufacturing business in men's and women's clothing. The business prospered and was continued until about 1921 when petitioner and his wife moved to California, bringing with them in excess of $200,000. This money was variously invested, much of it being lost before the taxable year. It is the income from such property that is in question for 1928." [Tr. pp. 9-10, fol. 10.]

The fact of the contract being found and its propriety under the California law being shown, the Board of Tax Appeals should have given it effect, and erred in not so doing.

D. The Board of Tax Appeals Erred in Sustaining the Determination of a Deficiency.

As appears by the statement of the Commissioner of Internal Revenue of March 9, 1931 [Tr. p. 7], the determination was based upon the refusal of the commissioner to allow a division of aggregate income between petitioner and his wife, on the theory that no part of it was common property. The theory of tenancy in common was ignored. No question as to the quantitative division between husband and wife was raised therein or on the hearing of the case before the Board of Tax Appeals. It is respectfully submitted that all of the property being owned in common by petitioner and his wife, it was proper for them to divide the income therefrom in their respective returns and that this matter should be remanded to the Board of Tax Appeals with instructions to order the re-computation of the income tax of the petitioner.

If it be contended that the petitioner is bound by the use of the words "community property" in the return filed by him for the tax year 1928, there will be remembered the confusion that existed in California for many years as to the rights of the wife in community property, particularly with regard to the income tax implications thereof, this confusion being finally eliminated by decisions of the Supreme Court of the United States.

The tendency throughout the history of California law on this subject has been to extend the present right of the wife in community property and likewise, which is most material here, to attempt to include in the community property, property acquired in other states and brought

into California. An example of this latter tendency is section 164 of the Civil Code as amended in 1917, which broadened the definition of community property by the words "including real property situated in the state, and personal property wherever situated, *acquired while domiciled elsewhere which would not have been the separate property of either if acquired while domiciled in this state.*" In *Estate of Frees,* reported in 187 Cal. 150 and decided in September, 1921, the 1917 amendment was held not retroactive. At the next session of the Legislature of California the statute was again amended for the purpose of avoiding the rule announced in the *Frees* case, the only substantial change being in substituting for the words "personal property wherever situated acquired while domiciled elsewhere," the words "personal property wherever situated heretofore or hereafter acquired while domiciled elsewhere."

On January 4, 1926, the Supreme Court of the United States decided the case of *U. S. v. Robbins* (70 L. Ed. 285), and held that under the interpretation placed by the California courts upon the pertinent statutes the wife had a mere expectancy in the community property while living with her husband, and therefore that the whole of the income of the community property was taxable to the husband alone.

In an obvious attempt to broaden the wife's present rights in community property as well as to confer upon the spouses a right to divide the community income for income tax purposes, the Legislature in 1927 added to the Civil Code, section 161-a, defining the respective interests of the husband and wife in community property

during continuance of the marriage relation as "present and existing equal interests under the management and control of the husband, as is provided in section 172 and 172-a of the Civil Code,"

> "161a. Interests in community property. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

Sections 164 and 172a were in supposed force and effect at the time the 1928 return of the petitioner herein was made up and filed, and it is not surprising that the return, made up by an auditor who was instructed to divide the income on an equal basis, should have used the words "community property" in the sense of property in which both spouses had a present equal interest and the income from which might be evenly divided between them. The property consisting of the proceeds of personalty brought into California from Canada prior to 1927 and acquired in Canada under circumstances which would have made it other than the separate property of either spouse if acquired in California, it was reasonable to assume that section 164, C. C., operated to convert it into community property from its entrance into the state. Taking the cited section at its face value, this would have been its effect upon the property owned in common by the petitioner and his wife prior to its being brought into California. Such effect was given to section

164 by the Supreme Court of California in its first decision in the case of *In re Estate of Thornton,* reported in 85 Cal. Dec. 253, in which it was held that property acquired by a husband and wife in Montana prior to 1919 and brought into California was community property under the authority of section 164, Civil Code, upon the ground that, under the laws of Montana, it was the husband's separate property when acquired. On rehearing, however, the California Supreme Court, in its decision reported in 87 Cal. Dec. 711 under date of May 17, 1934, reversed itself and declared the cited portion of the code section unconstitutional, saying (p. 713):

> "The doctrine that a change of domicile to this state, accompanied by an importation of the personalty, is an implied consent to a submission to requirements of this statute, cannot be sustained, for to do so would be to give effect to a restriction prohibited by the Constitution."

It is not surprising, therefore, that in 1929 when this return was prepared and filed, the parties may have believed the property which they had acquired as tenants in common in Canada was, upon its entrance into California, converted into community property, and that the addition to the Civil Code of section 161a in 1927 permitted the division of the income from such property between the respective returns of the husband and wife. Such misunderstanding, however, almost universal as it was, should not be permitted to deprive the petitioner of an undoubted right to divide the income of the property held in common by him and his wife in accordance with the oral contract between them, that is to say, equally between them.

E. Analysis of the Income Tax Returns.

A comparative summary of the returns of petitioner and his wife for the tax year in question shows the following income:

Source	David Gordon	Lillian Gordon
3. Interest on bank deposits, etc (except interest upon which a tax was paid at source)	$ 3,905.63	$ 1,395.62
3a. Interest on tax free covenant bonds upon which a tax was paid at source	1,925.00	1,925.00
5. Rents and royalties	7,308.40	7,008.40
6. Profit from sale of real estate, etc	28,574.83	8,649.52
7. Dividends on stock of domestic corporations	2,922.88	2,922.87
9. Other income — Hugh Evans, Inc. Tract	984.00	.....
Total income	$45,620.74	$21,901.41
DEDUCTIONS		
11. Interest paid	$ 9,588.01	$ 3,363.01
12. Taxes paid	3,643.92	2,816.44
15. Contributions	640.50	.....
16. Other deductions authorized by law	3,903.75	.....
Total Deductions	$17,776.18	$ 6,179.45
	$45,620.74	$21,901.41
	17,776.18	6,179.45
Net Income	$27,844.56	$15,721.96

As to income, items 3a and 7 are identical on each return, and the accountant's reason for the equal division of these sources of income is explained by the legend "community ½" inserted by him on each return opposite these items. Regardless of the accountant's theory, he at least obeyed the petitioner's instructions as to these items.

Item 5—rents and royalties—shows petitioner's income from this source to be exactly $300 in excess of that reported by his wife. Referring to Schedule B, it appears that the $300 difference results from the allocation to the petitioner of the income from a property at 8th and Kingsley streets amounting to $300 and an equal division between petitioner and his wife of an item of $14,016.80 explained by the legend "joint tenancy ½" on each return. The accountant followed instructions as to the major item but insisted on the allocation of the entire income from the 8th and Kingsley property to petitioner's return, the logical inference being that the property stood in petitioner's name alone. Acquired as it was with the common funds of petitioner and his wife, this income should have been divided evenly between them, regardless of the record ownership.

Referring to item 3—interest on bank deposits, etc.—upon which a tax was not paid at the source, we find the petitioner reporting $3905.63, the wife, $1395.62. The explanation of the wife's return in this respect is found in Schedule F of her return, respondent's Exhibit A, by which it appears that the reported sum of $1395.62 is

made up of interest received on mortgages and trust deeds acquired since July, 1927. Opposite each appears the legend "community ½," from which the accountant's theory becomes clear. The theory manifestly was that the oral agreement was ineffectual, that the income from the property of the spouses acquired since July, 1927, was properly divisible for income tax purposes but that income from property held in the name of or dealt in by either alone was to be allocated to the particular spouse involved; also that income from property acquired by either or both prior to July 29, 1927, was to be allocated to the husband alone.

An examination of the schedule attached to petitioner's return, respondent's Exhibit B, confirms this view. The income there allocated to item 3 is shown to be made up of the sum of $1395.63, composed of one-half of the income of the same properties referred to in the wife's Exhibit F, together with $2510 received from two sources not included within the designation "property acquired since July, 1927."

The remaining item of income is 6—Profit From Sale of Real Estate, etc. The wife's return reported under this heading the sum of $8649.52, unexplained upon her return. The explanation appears on Schedule C of the schedule attached to petitioner's return where it appears that an identical amount is reported by the husband as a part of the total of $28,574.83 reported by him under item 6 and that the divided income consisted of profit on

the sale of stocks and bonds bought and sold in 1928. Again appears the explanatory legend "community one-half."

The remaining $19,925.31 of this item reported by the husband, consists of profit made in real estate and personal property transactions dating from 1925 to 1928, inclusive. The inference is that Mrs. Gordon's name did not appear in these transactions.

Mr. Gordon stated that the bank accounts and most of the real estate dealings were in his name alone. [Tr. p. 22, fol. 23.] He likewise testified that his instructions to the accountant were to divide the income, regardless of source, between the two returns [Tr. p. 20, fols. 21. 22]; also that "the returns were made according to the conception of the auditor of which the law demanded." [Tr. p. 24, fol. 24.] The reasonable inferences to be drawn from the testimony and the two returns are as follows:

1. The auditor conceived that:

   (a) The law required the allocation to the husband of all income received from transactions carried on in the name of the husband alone.

   (b) The law permitted the division between the spouses of all income from transactions after July 1, 1927.

2. The auditor disregarded the oral agreement between the spouses by which all income from whatever

source obtained was to be their common property, as well as the instructions of petitioner in conflict with the auditor's conceptions.

As to the deductions, it is apparent that interest and taxes paid were divided on the same theory, that is to say, evenly as to the property held in joint tenancy and the so called "community property," the balance being allocated to the petitioner's return. Likewise the remaining deduction, an aggregate of commissions and other expense in connection with the sales of property acquired in petitioner's name alone, was allocated to the petitioner alone.

F. Summary.

1. The income of the spouses for 1928 arose solely from real and personal property situate in California.

2. Such property was acquired with the proceeds of the liquidation of a business formerly carried on by the spouses in Canada.

3. Prior to their marriage the spouses agreed that all property acquired by them or either of them should be common property and this agreement was fully executed by both.

4. The proceeds of such business, acquired under like circumstances in California, would not have been the separate property of either spouse but would belong to them as tenants in common.

5. Upon their coming to California the spouses renewed and fully executed the common property agreement.

6. As to the property acquired in California with such proceeds, the spouses were, in California, tenants in common, each owning an undivided one-half thereof.

7. Under the circumstances the spouses were entitled to divide equally between their income tax returns their common income.

8. The determination of deficiency by the Commissioner, to-wit, that the whole income should be taxed to the petitioner, was erroneous.

It is respectfully submitted that the matter should be remanded to the Board of Tax Appeals for re-computation of petitioner's income tax in conformity with the property agreement of petitioner and his wife.

Respectfully submitted,

FRED HOROWITZ,
Attorney for Petitioner.

No. 7484

In the United States Circuit Court of Appeals for the Ninth Circuit

DAVID GORDON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN
Assistant Attorney General.

SEWALL KEY,
LUCIUS A. BUCK,
Special Assistants to the Attorney General.

INDEX

CITATIONS

107850—35

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7484

DAVID GORDON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 9–11), which is unreported.

JURISDICTION

This case involves a deficiency in income taxes for the calendar year 1928 (R. 6). The Commissioner of Internal Revenue determined a deficiency in the amount of $2,614.50 (R. 6). The Board of Tax Appeals redetermined the deficiency and affirmed the Commissioner (R. 12). This appeal is taken from the decision of the Board of Tax Appeals, promulgated November 24, 1933 (R. 12).

The case is brought to this Court by a petition for review filed February 24, 1934 (R. 15), pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Taxpayer acquired personal property while he and his wife were domiciled in Quebec, Canada. Subsequently the property was sold and the proceeds invested in California. Did the taxpayer meet his burden of proof and show that one-half of income from the California investments was taxable to his wife by his own testimony of an informal oral agreement with his wife, made while they were domiciled in Canada, that they would share their property "fifty-fifty"?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra,* p. 11.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 9–10) are substantially as follows:

Taxpayer was born in the United States but when an infant moved, with his parents, to Canada where the parents became naturalized citizens. Taxpayer remained in Canada many years, and married there. At marriage taxpayer had no property or funds but his wife received $3,000 as a gift

from her parents. After marriage taxpayer and his wife agreed that everything was to be on a "fifty-fifty" basis. Taxpayer and his wife took the $3,000 and started a small manufacturing business in men's and women's clothing. The business prospered and was continued until about 1921, when taxpayer and his wife moved to California, bringing with them in excess of $200,000. This money was variously invested, much of it being lost before the taxable year. It is the income from such property that is in question for 1928.

Previous to 1928, taxpayer filed a joint return for himself and his wife. For 1928 they filed separate returns in which certain items of income were divided equally and other items unequally. Taxpayer's gross income is shown as $45,620.74 with a net income of $27,844.56, while Lillian Gordon, the wife, returned $21,901.41 as gross and $15,721.96 as net income.

SUMMARY OF ARGUMENT

If this case is to be decided under the community property law in the State of California, then the decision of the Board is correct and the entire amount of the income from the property was properly taxed to the taxpayer. This is true because the case, if governed by the community property law of California, is governed by that law as it existed prior to July 29, 1927, because the property was all acquired long prior to that date. Under

the law of California as it existed prior to that date, the wife had no present vested interest in the community estate and the title, dominion and control to and over the community property was so thoroughly vested in the husband that the income therefrom was taxable to him.

If the title to the property and hence the title to the income here in question is to be decided under the law of the Province of Ontario, Dominion of Canada, then the decision of the Board of Tax Appeals is correct and the entire income from the property was properly taxed to the taxpayer. This is true because the taxpayer failed to allege or prove the foreign law. Likewise, if the taxpayer relies upon the understanding or agreement with his wife made at the time that they were domiciled in Quebec, the decision of the Board of Tax Appeals is correct. The taxpayer failed to allege or prove that under the law of Quebec the alleged agreement or understanding was valid. The presumption of fact that the law of the foreign state is the same as the law of the forum invoked by the taxpayer is not applicable and even if the presumption were applicable it is only a presumption of fact and as such clashes with the presumption in favor of the correctness of the Commissioner's determination. Such being the case, the taxpayer would not be entitled to prevail on the mere basis of the presumption of fact.

ARGUMENT

I

Income is taxable to the husband under California law

In his petition (R. 2–4) the taxpayer states that the facts upon which he relies as a basis for the proceeding are as follows:

All of the property owned by petitioner was acquired subsequent to his marriage; that during the year 1928, and pursuant to amendment of the community property laws of the State of California, and pursuant to agreement between petitioner and his wife, he divided the community income; that if effect were given to the community property laws of the State of California and to the agreement between petitioner and his said wife, there would be no deficiency in the sum of $2,614.50, or any other sum.

Before considering the alleged agreement, we first invite the Court's attention to the legal situation presented by the contention in reference to the application of the community property law of California. When the taxpayer and his wife removed from Canada to California about 1921, he had in excess of $200,000 which was variously invested in California. It is the income from those investments that is now in question. It is clear that the income-producing property was all acquired prior to July 29, 1927. If we assume for the sake of argument that the property was community property

under the laws of California, the income was taxable to the taxpayer in its entirety. *United States* v. *Robbins,* 269 U. S. 315.

In the year 1927, the California legislature adopted an amendment to the Civil Code of California. The amendment became effective July 29, 1927, after being approved by the governor on April 28, 1927. The amendment, which is Section 161a of the Civil Code, reads as follows:

> 161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

On July 18, 1928, the Supreme Court of California held that Section 161a relates solely to property acquired after its effective date and does not in any manner relate to or govern the ownership of property acquired prior to July 29, 1927. *Stewart* v. *Stewart,* 204 Calif. 546, 555. See also *Sexton* v. *Daly,* 273 Pac. 109 (Calif.). It follows that this case is not governed by Section 161a of the Civil Code; and neither is it governed by the decision in *United States* v. *Malcolm,* 282 U. S. 792. That case was decided in reference to salary earned by the husband during the calendar year 1928; and it

merely held that such salary was community income, one-half of which was taxable to the wife under Section 161a.

II

Evidence does not show foreign law or validity of foreign agreement

The taxpayer contends that an oral agreement or understanding existed whereby he and his wife were to share everything they acquired after marriage on a "fifty-fifty" basis. This agreement or understanding was arrived at between the parties about the time of their marriage in the province of Quebec, Dominion of Canada. Is this evidence sufficient to show that title to one-half of the property acquired in Canada was in the taxpayer's wife at the time of their removal to California? The validity of the agreement must depend upon the law of Quebec. That law must be alleged and proved as any other fact in the case. "Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice." *Church* v. *Hubbart,* 2 Cranch 187, 235. "* * * the existence of a foreign law, written or unwritten, cannot be judicially noticed, unless it be proved as a fact, by appropriate evidence." *Ennis* v. *Smith,* 14 How. 399, 425.[1] This rule applies to the Board of Tax Appeals. *Columbian Carbon Co.* v. *Commissioner,*

[1] This case sets forth in detail the approved manner of proving foreign laws (pp. 425–429).

25 B. T. A. 456; *Burns* v. *Commissioner,* 12 B. T. A. 1209, 1224. See Section 601 of the Revenue Act of 1928, *infra;* Rule No. 39 of the Board of Tax Appeals, *infra; Winter* v. *Latour, 35 App.* D. C. 415.

The taxpayer failed to offer any proof whatsoever of the law of Quebec. We respectfully submit that the Board of Tax Appeals correctly stated (R. 11):

> Petitioner failed either to plead or prove the pertinent law of Canada respecting title to property. We can not assume it or take judicial notice of the same. Nor is quotation of such laws in the brief sufficient. The record fails to show that community property obtains in Canada, that it may be superseded by agreement of the parties, or even that husband and wife are free to contract with each other with respect to property. We are left in entire ignorance of the status or ownership of property in Canada.

The taxpayer has assigned as error the failure of the Board to presume that the community property law of California is the same as the community property law of Quebec; and that the law of Quebec relating to the validity of contracts is the same as the corresponding law of California. In the first place, the taxpayer has misconceived the presumption of fact which he seeks to apply. In *Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473, Mr. Justice Holmes, speaking for the Court, said (p. 479):

> Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still.

There is no room for the presumption of fact in this case. The community property law of California comes from the Spanish law. *United States* v. *Robbins, supra.* We know in a general way that the background of law and custom in the province of Quebec is French.

In the second place, the taxpayer asks this Court to indulge the presumption of fact and then asks the Court to hold that that presumption of fact overcomes the presumption in favor of the correctness of the determination of the Commisionser. Obviously the presumption of fact cannot be indulged in view of the Commissioner's determination and especially in view of the fact that the taxpayer had full opportunity before the Board of Tax Appeals to rebut that presumption with actual proof. Even if the presumption were indulged the taxpayer could not prevail. The two presumptions would

merely cancel each other and would leave the parties where they were in the beginning of these proceedings. i. e., with the deficiency determined against the taxpayer.

In the third place, if the presumption were indulged to aid in the establishing of the validity of the agreement or understanding the taxpayer would nevertheless fail. The agreement reflected in the testimony is nothing more than a very general understanding. Under the decisions of this Court it is not sufficient to render one-half of the income taxable to the wife. *Pedder* v. *Commissioner*, 60 F. (2d) 866 (C. C. A. 9th).

CONCLUSION

The decision of the Board of Tax Appeals is clearly correct and should be affirmed.

Respectfully submitted.

FRANK J. WIDEMAN.
Assistant Attorney General.
SEWALL KEY.
LUCIUS A. BUCK,
Special Assistants to the Attorney General.

JANUARY 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 601. BOARD OF TAX APPEALS PROCEDURE.

Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

* * * * *

"SEC. 907. (a) * * * The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. * * *"

* * * * *

Rule No. 39 of the Board of Tax Appeals:

RULE 39. *Evidence.*—The rules of evidence applicable in courts of equity of the District of Columbia shall govern the admission or exclusion of evidence before the Board or any of its Divisions.

U. S. GOVERNMENT PRINTING OFFICE: 1935

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GALEN H. WELCH, Collector of Internal Revenue, for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Defendant and Appellant:

PEIRSON M. HALL, Esq.,
United States Attorney,

ROBERT W. DANIELS, Esq.,
Assistant United States Attorney,

ALVA C. BAIRD, Esq.,
Assistant United States Attorney,

EUGENE HARPOLE, Esq.,
Special Attorney,

Bureau of Internal Revenue,

Federal Building,

Los Angeles, California.

For Plaintiff and Appellee:

MILLER, CHEVALIER, PEELER & WILSON, Esqs.,

JOSEPH D. PEELER, Esq.,

Title Insurance Building,

Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, and TO: MILLER, CHEVALIER, PEELER & WILSON, its attorneys:

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 8th day of March, A. D. 1934, pursuant to Order Allowing Appeal filed February 8, 1934. in the Clerk's Offiec of the District Court of the United States, in and for the Southern District of California, in that certain action entitled THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, vs. GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California, No. 4254-C, wherein GALEN H. WELCH, Collector of Internal Revenue, is Defendant and Appellant and you are Plaintiff and Appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 8th day of February, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

Receipt is acknowledged of a copy of the within Citation, together with a copy of the Petition for Appeal, Assignments of Error and Order Allowing Appeal herein.

DATED: FEBRUARY 8th, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

By Joseph D. Peeler

Attorneys for Plaintiff.

By D. Champion.

[Endorsed]: Filed Feb 8 – 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	:	
Plaintiff,	:	
-v-	:	At Law No. 4254-J
GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California,	:	COMPLAINT
Defendant.	:	

NOW COMES the plaintiff, The Kern River Oilfields of California, Ltd., a corporation, and through its attorneys complains of the defendant, Galen H. Welch, and as and for a cause of action against said defendant alleges:

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the jurisdiction of this court is dependent upon a Federal question in that the cause arises under the laws

of the United States of America pertaining to internal revenue, to-wit, the Revenue Act of 1924 and subsequent Acts.

III.

That the defendant Galen H. Welch, is now and has been since April 6, 1926, the Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City of Los Angeles, in the said State of California.

IV.

That this action is brought against the defendant as an officer acting under and by virtue of the Revenue Act of 1924 and later Acts on account of acts done under color of his office, and of the Revenue Laws of the United States as will hereinafter more fully appear.

V.

That plaintiff duly filed with the proper officer designated by statute, its income tax returns for the fiscal year ended May 31, 1925, as required by law and within the periods prescribed by law, on to-wit, August 13, 1925, November 14, 1925, and June 11, 1926.

VI.

That Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, demanded and exacted payment under protest and duress from the plaintiff of taxes shown on said returns in the following amounts and on the following dates:

August 13, 1925	$7,000.00
November 14, 1925	3,407.55
February 4, 1926	5,203.78
Total	$15,611.33

That the defendant, Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, demanded and exacted payment under protest and duress from the plaintiff of taxes shown on said returns in the following amounts and on the following dates:

May 12, 1926	$3,247.05
September 10, 1926	1,956.72
Total	$5,203.77

That the total taxes paid by plaintiff to the Collectors of Internal Revenue as set forth above, for the fiscal year ended May 31, 1925, was $20,815.10.

VII.

That on September 26, 1926, plaintiff filed with the defendant as Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund on the form provided by the Commissioner of Internal Revenue, setting forth overpayment of $1,956.72 or such greater amount as was legally refundable, and stating the following reasons for said claim:

"Because this amount is erroneously assessed by reason of the fact that it represents the difference between the tax shown as due by the original return filed for the fiscal year ended May 31st, 1925, and the corrected return filed in accordance with the Revenue Act of 1926. The latter

return shows a reduced net income due to depletion allowable under the 1926 Act and the correct tax is therefore smaller than the tax shown by the original return. Nevertheless the Collector has demanded and has been paid the tax shown on the original return."

That on November 8, 1928, plaintiff filed with the defendant as Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund on the form provided by the Commissioner of Internal Revenue, setting forth overpayment of $12,817.57, or such greater amount as was legally refundable, attaching thereto a schedule showing a recomputation of the taxes as follows:

"KERN RIVER OILFIELDS OF CALIFORNIA LTD. INCOME TAX RETURN FOR FISCAL YEAR ENDED MAY 31, 1925, STATEMENT ATTACHED TO CLAIM FOR REFUND.

	1924 Law	1925 Law
Net Income per Agents Report 10-24-28	$161,017.81	$78,444.16
Additional Deductions Allowable		
(1) London Offices Expenses $3,560.16		
(2) British Tax deducted from Dividends of St. Helens Petroleum Co. Limited, £7234-8@4.61 33,350.58	$33,350.58	

(2) British Income Tax Assured				
£555-6@4.61	25,586.88	62,497.62	25,586.88	62,497.62
Net Income adjusted		$98,520.19		$16,946.54
Income Tax Rate		12½%		13%
Tax		$12,315.02		$ 2,073.05
Number of months in year		7		5
Proration		7,183.76		813.77
Total tax assessable				7,997.53
Total tax paid				20,815.10
Amount refundable				$12,817.57

(1) The London Office expenses have been proportioned by the Revenue Agent between sources within and without the United States. These expenses should be allocated directly to the company's operations within the United States.

(2) The Revenue Agent has entirely ignored the deduction of all British taxes paid or accrued in accordance with Section 234a and Section 234b of the Revenue Act of 1924. These taxes were all paid on income from operations within the United States. The Kern River Oilfields of California Ltd. deducted from the payments of dividends to its stockholders an amount of £33,750-0-0."

VIII.

That by certificate of overassessment #975607, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed plaintiff's claim for refund in the amount of $4,825.16, and rejected same to the extent of $15,989.94, notifying plaintiff of such rejection therein in the following language:

"In the determination of this overassessment your claim for the refund of $12,817.57 has been given careful consideration and to the extent not herein allowed was disallowed by the Commissioner as of the date of the schedule above noted."

IX.

That the taxes heretofore collected from the plaintiff for the fiscal year ended May 31, 1925, are excessive to the extent of $2,986.79 for the reasons set forth in the claim for refund heretofore presented to the Commissioner of Internal Revenue, which are the same as the grounds set forth herein as the basis for this proceeding.

X.

During the fiscal year ended May 31, 1925, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £5550-6-0 Sterling, and British profits tax in the amount of £196-0-0, or a total of £5746-6-0, which, at the rate of $4.61 is the equivalent of $26,490.44 in United States currency. The Commissioner of Internal Revenue has determined that the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1925 was 86.93 per centum of the total net income of plaintiff. Accordingly,

under Section 234 of the Revenue Acts of 1924 and 1926, plaintiff is entitled to a total deduction on account of said British income taxes of 86.93 per centum of $26,490.44, or a net amount of $23,028.14. That the total tax upon the net income after such deduction would be $13,063.15. That in determining the taxes heretofore paid by the plaintiff for the fiscal year ended May 31, 1925, the Commissioner of Internal Revenue has not allowed any deduction on account of said British income and profits taxes.

XI.

That the defendant erroneously and illegally collected from the plaintiff and is erroneously and illegally withholding from plaintiff and is indebted to said plaintiff in the total amount of $2,926.79, with interest thereon as prescribed by law, representing amounts illegally exacted from plaintiff on account of income taxes for the fiscal year ended May 31, 1925.

XII.

That although often demanded the defendant has not nor has anyone on his behalf repaid or refunded said sum or sums or any part thereof, and said claim of said plaintiff herein is the sole property of plaintiff and has not been sold or assigned or transferred to any person or individual.

WHEREFORE, plaintiff prays for judgment against the defendant, Galen H. Welch, in the amount of $2926.79, together with interest at 6 per centum from dates of payment as provided by law.

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

CHARLES DRADER and R. W. STEPHENS being first duly sworn, on oath depose and say:

That the Kern River Oilfields of California, Ltd., plaintiff herein, is a corporation organized under the laws of Great Britain, with its principal office and place of business at Los Angeles, California.

That said CHARLES DRADER and R. W. STEPHENS are its attorneys-at-law and in-fact in charge of its business in the United States and duly authorized to verify this complaint. That they have read the complaint and that the facts contained therein are true to the best of their knowledge and belief.

Charles Drader
R. W. Stephens

Subscribed and sworn to before me this 6th day of November, A. D. 1930.

[Seal] Ethel E. Jones
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 6, 1930 R. S. Zimmerman, Clerk, By M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

ANSWER

Comes now the defendant, GALEN H. WELCH, and in answer to the above-entitled complaint admits, alleges and denies, to-wit:

I.

Denies specifically each and every allegation contained in paragraph I of said complaint.

II.

Admits each and every allegation contained in paragraph II of said complaint.

III.

Admits each and every allegation contained in paragraph III of said complaint.

IV.

Admits each and every allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V, the defendant admits that plaintiff filed its income tax returns for the fiscal year ended May 31, 1925, and further admits that two of said returns were filed on August 13, 1925 and November 14, 1925, respectively, as alleged. Denies specifically that any of such returns were filed by plaintiff on June 11, 1926, and alleges the fact to be that said return was filed on May 12, 1926.

Denies specifically each and every other allegation contained in said paragraph.

VI.

Answering paragraph VI, the defendant admits payment of the taxes in the amounts and on the dates set forth in said paragraph; denies specifically that said taxes, or any part thereof, were paid under protest and duress.

VII.

Admits each and every allegation contained in paragraph VII of said complaint.

VIII.

Answering paragraph VIII, defendant admits that the Commissioner of Internal Revenue allowed a refund to the plaintiff in the sum of $4,825.16; denies specifically that plaintiff's claim for refund was rejected to the extent of $15,989.94. The defendant alleges in this behalf that said claim for refund was rejected to the extent of $7,992.41.

IX.

Denies specifically each and every allegation contained in paragraph IX of said complaint.

X.

Denies specifically each and every allegation contained in paragraph X of said complaint.

XI.

Denies specifically each and every allegation contained in paragraph XI of said complaint.

XII.

Answering paragraph XII, the defendant admits that no part of the amount herein sought to be recovered has been repaid or refunded to the plaintiff. Denies specifically each and every other allegation contained in said paragraph.

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint and that defendant have his costs of suit.

SAMUEL W. McNABB,
United States Attorney,

Ignatius F. Parker.
IGNATIUS F. PARKER,
Assistant United States Attorney,

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

Alva C. Baird
ALVA C. BAIRD,
Special Attorney,
Bureau of Internal Revenue.

Richard W. Wilson,
RICHARD W. WILSON,
Special Attorney,
Bureau of Internal Revenue.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

GALEN H. WELCH, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth Internal Revenue Collection District of the State of California, and is the defendant named in the within entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

Galen H. Welch.
Collector of Internal Revenue.

Subscribed and sworn to before me this 29 day of December, 1930.

[Seal] T. G. Albright,
Notary Public.

My Commission Expires Oct. 22, 1932.

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed Dec. 30, 1930 R. S. Zimmerman, Clerk, By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION WAIVING JURY

IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

DATED: This 27th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON

By Joseph D. Peeler

Attorneys for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,

United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER

Assistant United States Attorney

Richard W. Wilson,
RICHARD W. WILSON,

Special Attorney for the Bureau of Internal Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk

[Title of Court and Cause.]

STIPULATION AND ORDER CONSOLIDATING CASES FOR TRIAL.

It is hereby stipulated by and between the plaintiff and defendant above named, through their respective attorneys, that the above-entitled cause may be consolidated for trial with the case of The St. Helens Petroleum Company, Ltd. v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, case #4252-C, which is set for trial on April 28, 1931.

This stipulation is entered into for the reason that the above cases are so similar in fact and law that it would be a waste of time for the court and the parties concerned to try the cases separately.

Feb. 24, 1931.

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

Richard W. Wilson,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

ORDER

Upon reading the above stipulation and good cause appearing therefor, the court hereby transfers the above-entitled cause to the trial calendar and department of the Honorable Judge Cosgrave.

Wm. P. James

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

CONSENT

Upon reading the above stipulation and the order of the Honorable Judge James appearing above, I hereby consent to and accept the transfer of the above cause to my department.

Geo Cosgrave,

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

ORDER

Upon reading the above stipulation and the above order and consent transferring the above-entitled cause to the Honorable Judge Cosgrave's department, the court hereby consents and orders that the above cases be consolidated for trial before the Honorable Judge Cosgrave on the 28th day of April, 1931.

Geo Cosgrave

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

[Endorsed]: Filed Feb 25, 1931 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oilfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal

year ended May 31, 1925, on August 13, 1925, November 14, 1925, and May 12, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, upon demand, taxes shown on said returns in the following amounts and on the following dates:

August 13, 1925	$7,000.00
November 14, 1925	3,407.55
February 4, 1926	5,203.78
Total –	$15,611.33

IV.

That the plaintiff paid to the defendant, Galen H. Welch, as Collector of Internal Revenue, taxes shown on said returns for the fiscal year ended May 31, 1925, in the following amounts and on the following dates:

May 12, 1926	$ 3,247.05
September 10, 1926	1,956.72
Total –	$ 5,203.77

V.

That on September 26, 1926, and on November 8, 1928, plaintiff filed with the Commissioner of Internal Revenue claims for refund of income taxes paid for the fiscal year ended May 31, 1925, in the manner and form provided by law, covering the issues raised in the complaint herein.

VI.

That by Certificate of Overassessment #975607, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed plaintiff's claim for refund in the amount of $4,825.16, and rejected it for $7,992.41 as of March 5, 1929.

VII.

That plaintiff is entitled to a further deduction of $785.46 on account of profits taxes accrued and paid to the Government of Great Britain during the fiscal year ended May 31, 1925.

VIII.

That during the fiscal year ended May 31, 1925, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £5550-6-0 Sterling, which, at the rate of $4.61, was the equivalent of $25,586.68 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1925, was 86.93 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,242.69. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,242.69 on account of said British income taxes.

IX.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1925.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 21, 1925, in the amount of $785.46 for additional profits taxes accrued and paid to the Government of Great Britain, and in the amount of $22,242.69 for income taxes accrued and paid to the Government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deductions.

The Court determines that the defendant Galen H. Welch, erroneously and illegally collected from plaintiff the sum of $2926.79, and that plaintiff is entitled to recover from defendant the sum of $2926.79, together with interest at the rate of six per cent on $2415.14 from February 4, 1926, and on $511.65 from November 14, 1925, as provided by law.

That plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

Approved as to form according to Rule 44

Eugene Harpole
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 4254-C.
GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant.	)	

JUDGMENT ON FINDINGS

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California,

Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson Esq., Special Attorney, Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of plaintiff in accordance with said findings:

NOW, THEREFORE, by virtue of the law, and by reason of the findings aforesaid, it is considered by the Cout that the plaintiff have judgment in the amount of $2,926.79 together with interest at the rate of six per cent on $1,956.72 from September 10, 1926, and on $970.07 from May 12, 1926, as provided by law, with costs taxed at $20.00.

Judgment rendered this Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

CERTIFICATE OF PROBABLE CAUSE

The Court certifies that the defendant, Galen H. Welch, as Collector of Internal Revenue, exacted and received payment of the monies recovered herein in the performance of his official duty, and that there was probable cause

for the act done by the defendant, and that he was acting under the directions of the Secretary of the Treasury, or other proper officer of the Government.

Geo. Cosgrave
United States District Judge.

Approved as to form as required by Rule 44.

Peirson M. Hall
Peirson M. Hall, E. H.
United States Attorney.

Ignatius F. Parker
Ignatius F. Parker, E. H.
Assistant United States Attorney.

Alva C. Baird
Alva C. Baird, E. H.
Assistant United States Attorney.

ATTORNEYS FOR DEFENDANT

Joseph D. Peeler
Joseph D. Peeler,
ATTORNEY FOR PLAINTIFF

JUDGMENT ENTERED NOVEMBER 8th, 1933

R. S. ZIMMERMAN, Clerk,
By Francis E. Cross, Deputy.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	)	
vs.	)	Law No. 4254-J.
GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California, Defendant,	)	

BILL OF EXCEPTIONS

Be it remembered that heretofore to-wit, on the 28th day of April, 1931, the above-entitled cause came on regularly for trial at Los Angeles, California, upon the issues joined herein before his Honor, George Cosgrave sitting as Judge of the above-entitled Court, without a jury, a jury having been duly waived by the parties by written Stipulation as follows:

"IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

"Dated: This 8th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON

BY JOSEPH D. PEELER,
Joseph D. Peeler,
Attorneys for Plaintiff.

Samuel W. McNabb,
Samuel W. McNabb,
United States Attorney,

Ignatius F. Parker,
Ignatius F. Parker,
Assistant U. S. Attorney,
Attorneys for Defendant."

Messrs. Miller, Chevalier, Peeler & Wilson by Joseph D. Peeler, Esq. appeared for plaintiff, and the defendant appeared by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker and Louis Somers, Assistant United States Attorneys for said District, and Richard W. Wilson, Special Attorney, Bureau of Internal Revenue, and the parties introduced in evidence a Stipulation as to certain facts, which had been agreed upon by both parties, which Stipulation (omitting the Exhibits therein referred to) is as follows:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

THE KERN RIVER OILFILEDS OF CALIFORNIA, LTD., a Corporation,	:	
Plaintiff,	:	
-v-	:	No. 4254-J.
GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California,	:	
Defendant.	:	

STIPULATION OF FACTS.

It is hereby stipulated and agreed by the parties, plaintiff and defendant, in this action, by their respective counsel, that the following statements of fact are true and correct, and shall be accepted and used as agreed evidence in this case, provided, however, that nothing herein shall prevent either party from introducing other and further evidence, not inconsistent herewith.

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal year ended May 31, 1925, on August 13, 1925, November 14, 1925, and May 12, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, upon demand, taxes shown on said returns in the following amounts and on the following dates:

August 13, 1925	$7,000.00
November 14, 1925	3,407.55
February 4, 1926	5,203.78
Total	$15,611.33

IV.

That the plaintiff paid to the defendant, Galen H. Welch, as Collector of Internal Revenue, taxes shown on said returns for the fiscal year ended May 31, 1925, in the following amounts and on the following dates:

May 12, 1926	$3,247.05
September 10, 1926	1,956.72
Total	$5,203.77

V.

That on September 26, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of income taxes paid for the fiscal year ended May 31, 1925,

in the manner and form shown by photostatic copy herewith, marked Exhibit No. 7.

VI.

That on November 8, 1928, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of income taxes overpaid for the fiscal year ended May 31, 1925, in the manner and form shown by photostatic copy herewith, marked Exhibit No. 8.

VII.

That by Certificate of Overassessment #975607, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed plaintiff's claim for refund in the amount of $4,825.16, and rejected it for $7,992.41 as of March 5, 1929.

VIII.

That plaintiff is entitled to a further deduction of $785.46 on account of profits taxes accrued and paid to the Government of Great Britain during the fiscal year ended May 31, 1925.

IX.

That during the fiscal year ended May 31, 1925, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £5550-6-0 Sterling, which, at the rate of $4.61, was the equivalent of $25,586.88 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1925, was 86.93 per centum of the total net income of plaintiff from all sources during said year. Plaintiff contends, and defendant denies, that plaintiff is entitled to a deduction, in determining its taxable

net income, of the British income taxes so accrued and paid to the Government of Great Britain; but it is agreed that if said taxes are deductible, the amount of said deduction for the fiscal year ended May 31, 1925, is $22,-242.68. It is also stipulated that plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,242.68 on account of said British income taxes.

X.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1925, and that, except as set forth in paragraph VII above, no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for the fiscal year ended May 31, 1922.

Joseph D. Peeler
Miller, Chevalier, Peeler & Wilson,
Counsel for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Richard W. Wilson,

Richard W. Wilson,

Special Attorney, Bureau of Internal Revenue.

Approved:

United States District Judge.

[Endorsed]: Filed April 28, 1931 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

Thereupon the respective parties having rested, plaintiff by its counsel, moved for judgment on the record and asked for special Findings of Fact, and the defendant, by his counsel, moved for judgment for the defendant on the oral and documentary evidence introduced. The Court reserved its ruling on said motions until the final decision of the case.

Counsel for the respective parties thereupon entered into the following Stipulation in open Court:

"MR. PEELER: There is just one thing I overlooked, and should have stated. This involves British cases and British law, and by agreement, we have not attempted to put into evidence the British law or the British cases. I don't know whether the court will take judicial notice

of them automatically or not, but we would like to stipulate that the court may take judicial notice of the British law incorporated in the briefs of counsel.

"MR. WILSON: That is agreeable to the Government, your Honor.

"THE COURT: Very well."

Pursuant to said Stipulation made in open Court, the plaintiff in its opening Brief cited the following British cases and British law:

Act of 1842, Section 54.

British Income Tax 1918, Schedule D, Par. 359.

British Income Tax 1918, Schedule D, Par. 394.

General Rules, Paragraph 420.

General Rules, Paragraph 439.

Law of Income Tax, E. M. Konstam, K. C., 1923.

Bradbury v. English Sewing Cotton Company, Ltd., (1922) 2 K.B. 589.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A.C. 171.

Gold Fields American Development Company, Ltd., v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times 14 (1926).

Rex v. Purdie (1914) 3 K. B. 112, 111 Times Law Reports 531.

Sheldrick v. South African Breweries, Ltd. (1923) 1 K. B. 173, at 191.

Defendant cited British cases and British law as follows in his Brief:

Ashton Gas Company v. Attorney General (1906) 75 L. J. Ch. 1, 93 L. T. 676.

Bart, Sir Marcus Samuel, v. The Commissioner of Inland Revenue, 34 T. L. R. 552 (Vol. 7, Great Britain Tax Cases, p. 27).

Brooke v. Commissioners of Inland Revenue (7 T. C. 261) (1918) 1 K. B. p. 257.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Mylam (Surveyor of Taxes) v. The Market Harborough Advertiser Company, Ltd., 21 T. L. R. 201, Great Britain Tax Cases, Vol. 5, p. 95.

Scottish Union and National Insurance Company v. New Zealand and Australian Land Company (1921), 1 App. Cas. 172.

Sheldrick v. South African Breweries, Ltd. (1923), 1 K. B. 173.

"Income Tax", F. G. Underhay.

"The Law of Income Tax", Second Edition, E. M. Konstam, K. C.

Report of Commissioner of Inland Revenue for the fiscal year ended March 31, 1922.

"Taxation of Business in Great Britain", Department of Commerce, Trade Promotion Series, No. 60, p. 65.

Great Britain:

Income Tax Act 1918 and Finance Acts 1919 to 1925, Inc.

Schedule D, paragraph 359.

Schedule D, paragraph 394,

Section 237, Act of 1918.

General Rules, paragraph 420.

General Rules, paragraph 439.

General Rules, paragraph 442.

In its Reply Brief, plaintiff cited British law and British cases as follows:

Konstam, Income Tax, pp. 19 and 20.

Ashton Gas Company v. Attorney General, 75 L. J. Ch. 1.

Bradbury v. English Sewing Cotton Co., Ltd., 2 K. B. 589.

Commissioners v. Blott, 2 A. C. 171.

Gold Fields American Development Company, Ltd. v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times, 14.

Ritson v. Phillips, 131 L. T. 384; 9 Tax Cas. 10.

Briefs were filed and the cause submitted for decision. Thereafter and on the 21st day of September, 1933, the Court made the following Minute Order:

At a stated term, to wit: The SEPTEMBER Term, A. D. 1933, of the District Court of the United States of America, within and for the CENTRAL Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES on THURSDAY the 21st day of SEPTEMBER in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable GEO COSGRAVE District Judge.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	Nos. 4252 4255
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue.	Nos. 4258-H 4045-H (Dismissed)
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue, Defendant.	Nos. 4253-M 4256-M 4257-J Law
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4254-J Law

These consolidated causes having under date of April 28, 1931 come before the Court for hearing, and having been ordered submitted on Stipulation of Facts filed and briefs to be filed, and briefs having been filed, and the Court having duly considered the matter, it is now by the Court ordered:

"The question presented in this case is whether, in computing its net taxable income, a foreign corporation is entitled to deduct income taxes paid a foreign country when such taxes so paid were, as permitted by the laws of the foreign country, deducted from dividends paid to its stockholders. The Revenue Act applicable to the years involved in clear language allows such deduction, but the government maintains that since the corporation is empowered to deduct from the dividends payable to its stockholders the amount of such tax, it does not come within the meaning of the Revenue Act.

"I think the position of the government is not well-founded. The foreign corporation in the express language of the Revenue Act is entitled to a deduction of such payments and I regard as entirely incidental the circumstance that under the laws of the foreign country the corporation is entitled to credit to the tax so paid when it comes to paying dividends to its shareholders. The interpretation sought by the government would change a ~~statute~~ / provision of a statute in which there is no ambiguity whatever. This may not be done. (Gould v. Gould, 245 U. S. 151).

Judgment is therefore ordered in favor of the plaintiffs with exception to defendant.

On the 8th day of November, 1933, defendant filed and presented the following Request for Findings of Fact and Conclusions of Law to the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD, a Corporation, Plaintiff,	)	
vs.	)	NO. 4254-J.
GALEN H. WELCH, Collector of Internal Revenue, Defendant.	)	

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Defendant above-named, by and through his attorney, Peirson M. Hall, United States Attorney for the Southern District of California, Ignatius F. Parker and Alva C. Baird, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and hereby requests the Court that in rendering and making its judgment in the above-entitled cause, which has been submitted to the Court, said Court make specific findings of fact and conclusions of law upon the issues included in said cause, as

set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney,
Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney,
Eugene Harpole,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,
Attorneys for Defendant.

Presented and rejected
Geo Cosgrave,
Judge.

FINDINGS OF FACT.

I.

That there was *so* substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

CONCLUSIONS OF LAW.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

II.

That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause.

Dated: This.....day of....., 1933.

.....

UNITED STATES DISTRICT JUDGE.

Approved as to form as
provided by Rule 44:

.....

.....

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

And plaintiff presented the following Findings of Fact and Conclusions of Law to the Court on the said 8th day of November, 1933:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	)	
vs.	)	No. 4254-C.
GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	)	

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for

said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oilfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal year ended May 31, 1925, on August 13, 1925, November 14, 1925, and May 12, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, upon demand, taxes shown on said returns in the following amounts and on the following dates:

August 13, 1925	$7,000.00
November 14, 1925	3,407.55
February 4, 1926	5,203.78
Total -	$15,611.33

IV.

That the plaintiff paid to the defendant, Galen H. Welch, as Collector of Internal Revenue, taxes shown on said returns for the fiscal year ended May 31, 1925, in the following amounts and on the following dates:

May 12, 1926	$3,247.05
September 10, 1926	1,956.72
Total –	$5,203.77

V.

That on September 26, 1926, and on November 8, 1928, plaintiff filed with the Commissioner of Internal Revenue claims for refund of income taxes paid for the fiscal year ended May 31, 1925 in the manner and form provided by law, covering the issues raised in the complaint herein.

VI.

That by Certificate of Overassessment #975607, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed plaintiff's claim for refund in the amount of $4,825.16, and rejected it for $7,992.41 as of March 5, 1929.

VII.

That plaintiff is entitled to a further deduction of $785.46 on account of profits taxes accrued and paid to the Government of Great Britain during the fiscal year ended May 31, 1925.

VIII.

That during the fiscal year ended May 31, 1925, plaintiff accrued and paid to the Government of Great Britain

an income tax in the amount of £5550-6-0 Sterling, which, at the rate of $4.61, was the equivalent of $25,586.68 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1925, was 86.93 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,242.69. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,242.69 on account of said British income taxes.

IX.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1925.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 21, 1925, in the amount of $785.46 for additional profits taxes accrued and paid to the Government of Great Britain, and in the amount of $22,242.69 for income taxes accrued and paid to the Government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deductions.

The Court determines that the defendant Galen H. Welch, erroneously and illegally collected from plaintiff the sum of $2926.79, and that plaintiff is entitled to

recover from defendant the sum of $2926.79, together with interest at the rate of six per cent on $2415.14 from February 4, 1926, and on $511.65 from November 14, 1925, as provided by law.

That plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

Approved as to form according to Rule 44
EUGENE HARPOLE
Special Attorney,
Bureau of Internal Revenue

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

Whereupon the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the Plaintiff, and adopted, made and entered the same as its Findings of Fact and Conclusions of Law herein and rejected the Findings of Fact and Conclusions of Law requested by the defendant to which the defendant noted an exception and on the 24th day of November, 1933, the following Order was duly made and entered by the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	)	No. 4254-C. ORDER ALLOWING EXCEPTIONS

IT IS ORDERED that exception in favor of the defendant, to the Court's action in adopting and entering the Conclusions of Law and Judgment presented by the plaintiff and in refusing to adopt the Findings of Fact and Conclusions of Law presented by the defendant, be entered on the minutes of the court as of the 8th day of November, 1933, by the Clerk, nunc pro tunc.

Geo Cosgrave,
UNITED STATES DISTRICT JUDGE

Approved as to form under
Rule 44 and no objection
offered to entry of the Order.

Joseph D. Peeler
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 24, 1933. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Plaintiff, Appellee, and Defendant, Appellant, that the foregoing Bill of Exceptions contains all evidence given and proceedings had in the trial of this action material to the Appeal of defendant, and that it may be approved, allowed and settled by the Judge in the above-entitled Court as correct in all respects; that the same shall be made a part of the record in said case and be the Bill of Exceptions therein and that said Bill of Exceptions may be used by either plaintiff or defendant upon any Appeal taken by plaintiff or defendant, and that said Bill may be certified and signed by the Judge upon presentation of this Stipulation without further notice to either party hereto or to their respective counsel.

Dated: This 26th day of April, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

By Joseph D. Peeler

Attorneys for Plaintiff and Appellee.

Peirson M. Hall

PEIRSON M. HALL, D

United States Attorney,

Robert W. Daniels

ROBERT W. DANIELS,

Asst. U. S. Attorney,

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant U. S. Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS

The *following* Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties plaintiff or defendant upon any appeal taken by either party plaintiff or defendant.

Dated: This 27th day of April, 1934.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including the 8th day of February, 1934.

Dated: November 15, 1933.

Geo Cosgrave,
UNITED STATES DISTRICT JUDGE

[Endorsed]: Filed Nov. 15, 1933. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TERM
and Time.

Upon motion of the Defendant, and good cause appearing therefor,

IT IS ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Time and the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including May 8, 1934. and the time therefore is extended accordingly.

DATED: February 7, 1934.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Feb 7-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL FROM JUDGMENT ENTERED NOVEMBER 8, 1933.

TO THE ABOVE ENTITLED COURT AND TO HONORABLE GEORGE COSGRAVE, JUDGE THEREOF

Your petitioner, the defendant in the above-entitled case, feeling aggrieved by the judgment as entered herein in favor of said plaintiff on November 8, 1933, prays that this Appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided, and in connection with this petition petitioner hereby presents Assignment of Errors dated February 8th, 1934.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney.

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant United States Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	NO. 4254-C. ASSIGNMENT OF ERRORS.

The Defendant and appellant above-named makes and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal from the judgment of this Court entered therein on the 8th day of November, 1933.

I.

The Court erred in rendering judgment against the Defendant and in favor of the plaintiff in the amount of

$2,926.79, together with interest at the rate of six per cent (6%) on $1,956.72 from September 10, 1926, and on $970.07 from May 12, 1926, with costs taxed at $20.00, in that the evidence introduced herein and the facts found therefrom by the Court and the record in this cause are insufficient to support a judgment in favor of the plaintiff in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the Court and the record disclose that plaintiff is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1925 accrued and paid to the Government of Great Britain an income tax equivalent to $25,586.88 in United States currency; and that the plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,242.68 on account of said British income taxes.

II.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff herein for the reason that said judgment is not supported by the facts found by the Court herein for the reason that the Court found as a fact that during the fiscal year ended May 31, 1925, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £5550-6-0 Sterling, which, at the rate of $4.61, was the equivalent of $25,586.68 in United States currency. The income of plaintiff from sources within the United States during the

fiscal year ended May 31, 1925, was 86.93 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,242.69. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,242.69 on account of said British income taxes.

III.

The Court erred in refusing to adopt the Defendant's Proposed Finding of Fact Number I, which reads as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

IV.

The Court erred in refusing to adopt the Defendant's Proposed Conclusions of Law numbered I and II, which read as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action."

"II.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause",

for the reason that the evidence introduced and the facts found by the Court in this action require the adoption of said Conclusions of Law.

V.

The Court erred in concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to allow the plaintiff a deduction on its income tax return for the fiscal year ended May 31, 1925 in the amount of $785.46 for additional profits taxes accrued and paid to the Government of Great Britain, and the amount of $22,242.69 for income taxes accrued and paid to the Government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom by the Court disclose that the amount of $22,242.69 so accrued and paid to the Government of Great Britain for income taxes by plaintiff was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1925.

VI.

The Court erred in failing to find and conclude as a matter of law herein that no part of the amount of

$22,242.69, accrued and paid by the plaintiff to the Government of Great Britain as an income tax during the fiscal year ended May 31, 1925, and deducted by plaintiff from dividends paid by it to its stockholders during said fiscal year, was deductible from plaintiff's gross income for said year in computing the correct income tax due from it to the Government of the United States.

VII.

The Court erred as a matter of law in not rendering judgment against the plaintiff and in favor of the defendant for his costs and disbursements expended herein.

Dated: February 8th, 1934.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney.

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney.

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

In the above-entitled action, the defendant having filed its petition for an order allowing it to appeal from the judgment entered in the above-entitled action on November 8, 1933;

It Is Ordered, That said appeal, from said judgment, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed to the defendant, and that a certified transcript of the record, bill of exceptions, exhibits, stipulations and pleadings and all proceedings herein be transmitted to said United States Circuit Court of Appeals.

Dated this 8th day of February, 1934.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

SECOND AMENDED PRAECIPE

TO: R. S. Zimmerman, Clerk of the United States District Court, Southern District of California:

YOU ARE HEREBY REQUESTED to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. Stipulation Waiving Jury.
5. Stipulation and Order Consolidating Cases for Trial.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated November 15, 1933.
9. Order Extending Term and Time to File Bill of Exceptions, dated February 7, 1934.
10. Petition for Appeal.
11. Assignments of Error on Appeal.
12. Order Allowing Appeal.

13. Bill of Exceptions.

(a) Stipulation Waiving Jury.

(b) Stipulation of Facts with Exhibits omitted.

(c) Stipulation of Counsel in open Court and citations of British Law and Cases.

(d) Minute Order dated September 21, 1933.

(e) Defendant's Request for Findings of Fact and Conclusions of Law.

(f) Plaintiff's Proposed Findings of Fact and Conclusions of Law.

(g) Order Allowing Exceptions Nunc Pro Tunc.

14. Clerk's Certificate and this Second Amended Praecipe.

Dated: This 26th day of April, 1934.

Peirson M. Hall D.
PEIRSON M. HALL,
United States Attorney.

Robert W. Daniels
ROBERT W. DANIELS
Assistant United States Attorney,

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant United States Attorney.

Eugene Harpole
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Appellant and Appellee that the foregoing Second Amended Praecipe may be filed, shall be used in lieu of and replace all Praecipes heretofore filed for the purpose of the preparation of the record upon Appeal in the above-entitled action; that in preparing the record herein, the Clerk of the United States District Court may omit all endorsements, except the endorsements of the filing date, from the papers requested in the foregoing Second Amended Praecipe.

MILLER, CHEVALIER, PEELER & WILSON,
BY Joseph D. Peeler,
Attorneys for Plaintiff and Appellee.

Peirson M. Hall D.
PEIRSON M. HALL,
United States Attorney.

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney.

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant United States Attorney,

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 60 pages, numbered from 1 to 60 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; stipulation waiving jury; stipulation and order consolidating cases for trial; special findings of fact and conclusions of law; judgment; bill of exceptions; order extending time within which to serve and file bill of exceptions; order extending term and time to file bill of exceptions; petition for appeal assignment of errors; order allowing appeal, and second amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7489

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

On Appeal From the District Court of the United States, for the Southern District of California,

BRIEF FOR THE APPELLANT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.
Counsel for Appellant.

SUBJECT INDEX

APPENDIX

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

BRIEF FOR THE APPELLANT

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California (R. 36-37), which is unreported.

Jurisdiction

This appeal involves income taxes of The Kern River Oilfields of California, Ltd., a corporation, for the fiscal year ended May 31, 1925 (R., 28-29), and is taken from a judgment of the District Court in favor of the taxpayer entered November 8, 1933 (R., 23-24). The appeal is brought to this Court by petition for appeal on

behalf of the Collector of Internal Revenue filed February 8, 1934 (R., 51), pursuant to Section 128 (a) of the *Judicial Code,* as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a British corporation, doing business in the United States, is entitled to deduct from gross income, income taxes paid to Great Britain when such income taxes were deducted from dividends paid to its stockholders.

2. Whether the judgment is supported by the findings.

Statutes and Regulations Involved

The applicable provisions of the Revenue Act of 1924 and of Treasury Regulations 65 will be found in the Appendix, *infra*, pp. 1-3. The applicable statutes of Great Britain will be found in Appendix B in appellant's brief in the case of *Galen H. Welch, Collector, v. The St. Helens Petroleum Company, Ltd., a corporation,* No. 7488, now pending before this Court.

Statement

The facts were stipulated. (R., 28-35.) The appellee is a corporation organized under the laws of Great Britain, having an office and place of business at Los Angeles, California (R., 28), whose income from sources within the United States during the fiscal year ended May 31, 1925, was 86.93 per centum of its total income from all sources during that year. (R., 30.)

During the fiscal year ended May 31, 1925, appellee accrued and paid to the government of Great Britain an income tax amounting to £5,550-6-0 Sterling, which at the rate of $4.61 was the equivalent of $25,586.88 in United States currency, of which appellee deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $22,242.68 on account of said British income taxes. (R., 30-31.)

In its income tax returns for the fiscal year ended May 31, 1925, appellee reported a tax due therein of $15,-611.33, which was duly assessed and paid to Rex B. Goodcell, then Collector of Internal Revenue for the Sixth Collection District of California. (R., 29.) Upon amended income tax returns thereafter filed there was duly assessed against appellee and paid to appellant an additional tax amounting to $5,203.77. (R., 29.)

On or about September 26, 1926, appellee filed with the Commissioner of Internal Revenue a claim for refund of $1,956.72 of the tax paid for the fiscal year ended May 31, 1925, claiming that said amount was erroneously assessed because it represented the difference between the tax reported on the original return and that shown upon a corrected return alleged to have been filed in accordance with the Revenue Act of 1926. (R., 6-7.) Thereafter on or about November 8, 1928, appellee filed with the Commissioner of Internal Revenue a claim for refund of $12,817.57 of the tax paid for the same fiscal year, claiming additional deductions allowable of $3,560.16 on account of London offices expenses; $33,350.58 on account of British tax deducted from divi-

dends of St. Helens Petroleum Company, Limited; and $25,586.88 on account of British income taxes (representing amounts deducted from dividends paid to its stockholders). (R., 7-8.) The Commissioner allowed appellee's claim for refund to the extent of $4,825.16, and rejected it to the extent of $7,992.41. (R., 30.) No other deductions were claimed by appellee in its claim for refund (Ex. 7, 8), or in the complaint (R., 4-11). The Commissioner has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1925. (R., 31.) Appellee contended, and appellant denied, that appellee was entitled to such deduction, but it was agreed that if said British income taxes were deductible, the amount of such deduction for the fiscal year ended May 31, 1925, was $22,242.68. (R., 30-31.) This amount was allowed as a deduction by the court. (R., 21, 44.)

Upon the basis of the disallowance by the Commissioner of appellee's claim for refund to the extent of $7,992.41 (R., 30), this suit was commenced on November 6, 1930, for the recovery of $2,926.79 (R., 4-11).

By stipulation a jury was waived, and the case was tried by the court without the intervention of a jury. (R., 27.) At the close of all the evidence counsel for appellant moved for judgment in favor of the appellant (R., 32), and on September 21, 1933, the court, by minute entry, ordered judgment in favor of the appellee (R., 36-37). The appellant filed request for special findings of fact and conclusions of law (R., 38-40), which were denied by the court (R., 45). The findings adopted

by the court (R., 19-22) were those requested by the appellee (R., 41-45).

The court held that the appellee was entitled to a deduction of $22,242.69 on account of dividends paid to the government of Great Britain and deducted from dividends to its stockholders (R., 22), and on this basis rendered judgment for the appellee for $2,926.79 (R., 23-24). From the judgment for appellee the appellant has appealed. (R., 51.)

Specifications of Errors to be Urged

The court erred (R., 52-56):

1. In rendering judgment against the appellant and in favor of the appellee in the amount of $2,926.79, together with interest at the rate of six per cent (6%) on $1,956.72 from September 10, 1926, and on $970.07 from May 12, 1926, with costs taxed at $20, in that the evidence introduced herein and the facts found therefrom by the court and the record in this cause are insufficient to support a judgment in favor of the appellee in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the court and the record disclose that appellee is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1925, accrued and paid to the government of Great Britain an income tax equivalent to $25,586.88 in United States currency; and that the appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,242.68 on account of said British income taxes.

2. In rendering judgment against the appellant and in favor of the appellee herein for the reason that said judgment is not supported by the facts found by the court herein for the reason that the court found as a fact that during the fiscal year ended May 31, 1925, appellee accrued and paid to the government of Great Britain an income tax in the amount of £5,550-6-0 Sterling, which, at the rate of $4.61, was the equivalent of $25,586.88 in United States currency. The income of appellee from sources within the United States during the fiscal year ended May 31, 1925, was 86.93 per centum of the total net income of appellee from all sources during said year. The amount of the British income tax allocable to United States income was $22,-242.69. Appellee deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,242.69 on account of said British income taxes.

3. In refusing to adopt appellant's Proposed Finding of Fact Number I, which reads as follows (R., 54):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action."

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

4. In refusing to adopt the appellant's Proposed Conclusions of Law numbered I and II, which read as follows (R., 54-55):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which

to support a Judgment in its favor in the above-entitled action.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause."

for the reason that the evidence introduced and the facts found by the court in this action require the adoption of said Conclusions of Law.

5. In concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to allow the appellee a deduction on its income tax return for the fiscal year ended May 31, 1925, in the amount of $785.46 for additional profits taxes accrued and paid to the government of Great Britain, and the amount of $22,242.69 for income taxes accrued and paid to the government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom by the court disclose that the amount of $22,242.69 so accrued and paid to the government of Great Britain for income taxes by appellee was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1925.

6. In failing to find and conclude as a matter of law herein that no part of the amount of $22,242.69, accrued and paid by the appellee to the government of Great Britain as an income tax during the fiscal year ended

May 31, 1925, and deducted by appellee from dividends paid by it to its stockholders during said fiscal year, was deductible from appellee's gross income for said year in computing the correct income tax due from it to the Government of the United States.

7. As a matter of law in not rendering judgment against the appellee and in favor of the appellant for his costs and disbursements expended herein.

Argument

This appeal involves the identical questions that are presented in the third argument in the brief for the appellant in the case of *Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California v. The St. Helens Petroleum Company, Ltd., a corporation*, No. 7488, now pending before this Court. The appellant's position is fully presented in the brief for the appellant filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellant's brief in *The St. Helens Petroleum Co., Ltd.*, case, No. 7488, are served herewith upon counsel for the appellee.

Conclusion

For the reasons stated in the appellant's brief in *The St. Helens Petroleum Co., Ltd.*, case, No. 7488, it is urged that the decision of the court below in holding that amounts accrued and paid by the appellee to the government of

Great Britain as an income tax and deducted by appellee from dividends paid by it to its stockholders during the fiscal year was deductible from appellee's gross income for that year, was erroneous, and should be reversed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.

January, 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(3) Taxes paid or accrued within the taxable year except * * * (B) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238, * * *.

* * * * *

(b) In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the deductions allowed in subdivision (a) shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 217 under rules and regulations prescribed by the Commissioner with the approval of the Secretary. (U. S. C., Title 26, Sec. 986.)

SEC. 238. (a) In the case of a domestic corporation the tax imposed by this title shall be credited with the amount of any income, war-profits, and excess-profits taxes paid or accrued during the same taxable year to any foreign country, or to any possession of the United States: *Provided,* That the amount of such credit shall in no case exceed the same proportion of the tax (computed on the basis of the tax-

payer's net income without the deduction of any income, war-profits, or excess-profits taxes imposed by any foreign country or possession of the United States) against which such credit is taken, which the taxpayer's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term "net income" as used in this subdivision means net income as defined in sections 245 and 246, respectively.

* * * * *

(U. S. C., Title 26, Sec. 990.)

Treasury Regulations 65:

ART. 611. *Credit for foreign taxes.*—This credit includes income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States, but shall not exceed the same proportion of the tax (computed on the basis of the corporation's net income without the deduction of any income, war-profits, or excess-profits taxes imposed by any foreign country or possession of the United States) against which the credit is taken, which the corporation's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. To secure such a credit a domestic corporation must pursue the same course as that prescribed for an individual by article 383, except that Form 1118 is to be used for claiming credit and Form 1119

for the bond, if a bond be required. For the redetermination of the tax, when a credit for such taxes has been rendered incorrect by later developments, see article 384, all of the provisions of which apply with equal force to a corporation taxpayer. For credit where taxes are paid by a foreign corporation controlled by a domestic corporation, see article 612. A claim for credit in such a case is also to be made on Form 1118. For the meaning of the terms used in section 238 of the statute see section 2 and article 382. See article 387 with reference to the option granted by section 238 (c).

No. 7489.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF STATUTES CITED.

No. 7489.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the court below, the District Court of the United States for the Southern District of California, which is unreported, is set forth on pages 37-39 of the Transcript of Record.

JURISDICTION.

This appeal involves income and profits taxes for the fiscal year ended May 31, 1925, and is taken from a judgment of the District Court entered in favor of the taxpayer on November 8, 1933. [R. 23-25, 29.] The appeal is brought to this Court by petition for appeal filed by appellant on February 8, 1934 [R. 51], pursuant to Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

During the taxable year ended May 31, 1925, the appellee paid to Great Britain certain income taxes upon its profits and subsequently deducted a corresponding amount from dividends paid by it to its stockholders during said year. Were such taxes deductible from its gross income for said taxable year? The fundamental question is whether said taxes were imposed by Great Britain upon the corporation's income or upon the dividends paid to its stockholders.

STATUTES INVOLVED.

The applicable provisions of the Federal and British statutes will be found in the appendix attached to the brief filed in Docket No. 7488.

STATEMENT OF FACTS.

All the facts were stipulated. [R. 28-35.] The appellee is a corporation organized under the laws of Great Britain having its principal office and place of business in Los Angeles, California. [R. 28.] During the fiscal year ended May 31, 1925, it accrued and paid to the Government of Great Britain an income tax in amount, converted into United States currency, of $25,586.88. [R. 30.] During the same fiscal year its income from sources within the United States was 86.93 per cent of its total net income from all sources. [R. 30.] Appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,242.68, on account of said British taxes. [R. 31.] The parties hereto stipulated and agreed that if the plaintiff is entitled to a deduction, in determining its taxable net income, of income taxes so accrued and paid to Great Britain, the amount of said deduction for the fiscal year ended May 31, 1925, is $22,-242.68. [R. 31.] The Commissioner of Internal Revenue allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1925. [R. 31.]

In its tax returns for the fiscal year ended May 31, 1925, appellee reported total taxes in the amount of $20,-815.10, which was duly assessed and paid, of which $5,203.77 was paid to appellant, the then Collector of Internal Revenue. [R. 29.]

Within the period and in the manner provided by law, appellee filed with the Commissioner of Internal Revenue a claim for refund, setting forth therein the same grounds alleged in its Complaint in the present proceeding. [R. 6-10, 13, 29-30, 43.] The Commissioner of Internal Revenue rejected said claim for refund and appellee filed its complaint in the present proceeding. [R. 4, 30, 43.]

By stipulation a jury was waived and the case was tried by the Court without the intervention of a jury [R. 16, 41]. The parties filed with the Court a stipulation of facts, in which appellant stipulated that appellee was entitled to a further deduction on account of profits taxes accrued and paid to Great Britain. [R. 43.] The parties also stipulated the facts, as set forth above, with respect to the British income taxes, leaving for determination by the Court the question of deductibility [R. 30-31]. At the close of all the evidence, counsel for each party moved for judgment on the record. [R. 32.] On September 21, 1933, the Court, by minute order, ordered judgment in favor of appellee [R. 36-37.] Appellant filed requests for special findings of fact and conclusions of law, which were rejected by the Court. [R. 38-40, 45.] The Court accepted and adopted the findings and conclusions of law requested by appellee [R. 41-45]. The Court determined that the Commissioner had erred in refusing to allow to appellee a deduction from income in the amount of $22,242.68 for British income taxes, and in the amount of $785.46 for British profits taxes, and in levying tax assessments on the basis of net income computed without the allowance of said deductions. [R. 44-45.] On this basis, the Court rendered judgment for the appellee for $2,926.79, with interest as provided by law. [R. 45.] From this judgment for appellee, the appellant has appealed. [R. 51.]

PRELIMINARY STATEMENT.

At the trial below, six associated cases were consolidated for trial, all being suits against present or former collectors of internal revenue for income or income and profits taxes alleged to have been erroneously collected. In each of these cases, judgment was entered by the Court in favor of the taxpayer, and all, upon appeal, have been set for argument together before this Court. Following is a list of these cases, showing the Docket No. in this Court, the names of the parties, and the fiscal year involved.

Docket No.	Taxpayer (Appellee)	Collector (Appellant)	Fiscal Year Ended May 31
7488	The St. Helens Petroleum Co., Ltd.	Galen H. Welch	1921
7490	" " " " "	" "	1922
7493	" " " " "	Rex B. Goodcell	1922
7491	The Kern River Oilfields of Cal., Ltd.	" " "	1923
7492	" " " " "	" " "	1924
7489	" " " " "	" " "	1925

Dockets 7490 and 7493 involved the same taxpayer, the same taxable year, and the same issues, with separate suits being brought and separate judgments being rendered against two successive collectors of internal revenue because a part of the tax in controversy was paid to each of them.

The issue involving the deductibility of British income taxes is involved in *all* of these cases and was the only issue presented by the parties at the trial below, the other issues raised by the pleadings having been conceded by appellants in the stipulations filed at the trial. [R. 37.]

The other issue, involved only in Docket Nos. 7488, 7490, and 7493, is the jurisdiction of the trial court to enter judgment in any case where the profits taxes have been determined under Section 328, Revenue Acts of 1918

and 1921. As Congress did not impose any profits tax for any period after December 31, 1921, this issue naturally is not presented in Docket Nos. 7489, 7491 and 7492.

Appellants have presented their full arguments on both issues in the brief filed in Docket No. 7488, and have merely referred to said brief in the briefs presented in all other cases. As a matter of convenience and to avoid confusion, the same procedure is being followed by appellees. Accordingly the full statement of argument on both issues will be presented in the brief filed under Docket No. 7488.

SUMMARY OF ARGUMENT.

Under the Federal Revenue Acts of 1918 and 1921, the deduction for taxes (including income taxes paid to a foreign Government) is allowable to the one on whom the taxes were imposed and by whom they were paid. It has been stipulated and found by the Court that the British income tax of $22,242.68, in issue here, was paid to the British Government by the appellee. [R. 31.] It is clear that, under British law, this tax was imposed on appellee, was determined on the basis of its net income, and was payable in any event, even though no dividends might ever be declared to its shareholders.

There is no British income tax on dividends as such. In paying the British income tax, appellee did so as a taxpayer and not as an agent for its shareholders. The mere fact that it was permitted, though not required, under the British practice, to deduct from dividends paid, if any, a proportionate amount of the tax, does not change the fact that it paid the taxes on its own behalf as a tax-

payer. Such deductions from dividends did not result in any reimbursement to appellee of its own income tax payment; having paid the tax, its income available for dividends was merely the lesser sum.

To speak of the payment of the income tax by appellee as a "withholding" is simply a misnomer contrary to facts. It was required to pay the tax to the British Government on *its* entire net income even though (1) it made no payment whatever to its stockholders and (2) the stockholders had no income from this or any other source.

The construction contended for by appellant would result in confusion in the administration of our tax laws and often would result in an unfair and unjust duplication of deductions, defeating the collection of tax revenues.

The statute is plain and unambiguous, leaving no need for departmental construction. There has been no uniform and long continued rule of construction by the courts, the Board or the Treasury Department. The informal Bureau rulings relied upon by appellant "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." As a matter of fact, the Bureau's views on this question have changed from time to time. At the present time the Department is contending in various cases before the Board precisely in accordance with appellee's contentions herein.

ARGUMENT.

The detailed argument of appellee on this question is set forth in the brief filed for appellee in the case of *Welch v. St. Helens Petroleum Co., Ltd.,* No. 7488, now pending before this Court, which is included herein by reference.

CONCLUSION.

Appellee submits that for the reasons set forth above the Court below properly held that appellee was entitled to a deduction of $22,242.68 on its income tax return for the fiscal year ended May 31, 1925, on account of income taxes paid during said year to the Government of Great Britain.

Respectfully submitted,

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Defendant and Appellant:

PEIRSON M. HALL, Esq.,
United States Attorney,

ROBERT W. DANIELS, Esq.,
Assistant United States Attorney,

ALVA C. BAIRD, Esq.,
Assistant United States Attorney,

EUGENE HARPOLE, Esq.,
Special Attorney,
Bureau of Internal Revenue,
Federal Building,
Los Angeles, California.

For Plaintiff and Appellee:

MILLER, CHEVALIER, PEELER & WILSON, Esqs.,
JOSEPH D. PEELER, Esq.,
Title Insurance Building,
Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, and TO: MILLER, CHEVALIER, PEELER & WILSON, its attorneys:

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 8th day of March, A. D. 1934, pursuant to Order allowing Appeal filed February 8, 1934, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, vs. REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, No. 4256-C, wherein REX B. GOODCELL, Former Collector of Internal Revenue, is Defendant and Appellant, and you are Plaintiff and Appellee to show cause, if any there be, why the.....in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 8th day of February, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

Receipt is acknowledged of a copy of the within Citation, together with a copy of the Petition for Appeal, Assignments of Error and Order Allowing Appeal herein.

DATED: February 8th, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

By Joseph D. Peeler

Attorneys for Plaintiff.

By D. Champion

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff, -v- REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	)	At Law No. 4256-M. COMPLAINT

NOW COMES the plaintiff, The Kern River Oilfields of California, Ltd., a corporation, and through its attorneys complains of the defendant, Rex B. Goodcell, and as and for a cause of action against said defendant alleges:

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the jurisdiction of this court is dependent upon a Federal question in that the cause arises under the laws of the United States of America pertaining to internal

revenue, to-wit, the Revenue Act of 1921 and subsequent Acts.

III.

That the defendant, Rex B. Goodcell, was, from March 6, 1922 to April 5, 1926 inclusive, the Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City of Los Angeles, in said State of California.

IV.

That this action is brought against the defendant as an officer acting under and by virtue of the Revenue Act of 1921 and later Acts on account of acts done under color of his office, and of the Revenue Laws of the United States as will hereinafter more fully appear.

V.

That the plaintiff duly filed with the defendant as the proper officer designated by statute its corporation income tax returns for the fiscal year ended May 31, 1923, within the periods prescribed by law, that is, on to-wit, August 15, 1923, November 14, 1923, and April 6, 1926.

VI.

That the defendant Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, demanded and exacted payment under protest and duress from the plaintiff, of taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1923	$1,562.50
November 14, 1923	3,382.70
February 15, 1924	2,452.28
February 15, 1924	2,465.82
Total	$9,863.30

VII.

That on April 6, 1926, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund on the form provided by the Commissioner of Internal Revenue, setting forth overpayment of $1,090.70, or such greater fund as is legally refundable, and stating the following reasons for said claim:

"That in computing the taxable net income for the fiscal year ended May 31, 1923, the taxpayer inadvertently omitted to include certain expenses incurred by its London Office for the administration of its California properties. An amended return is filed herewith."

VIII.

That on August 15, 1927, plaintiff filed with the Collector of Internal Revenue, for the Sixth Collection District of California, a claim for refund on the form provided by the Commissioner of Internal Revenue for the fiscal year ended May 31, 1923, claiming a refund of $9863.30 and setting forth the following reasons for said claim:

"The income tax originally filed omitted any deductions for expenses paid in London or for British taxes paid. The deductions now claimed as as follows:

California Audit Fee	£ 150-0-0
Traveling Expenses	202-2-0
Administration Expense	8609-19-8
British income taxes deducted from dividends received	9395-12-5
British Income Taxes paid	8766-5-0
	£ 27123-19-1
	@ $4.55=$123,413.95

"Tax of 12½% of which equals $15,426.74.

"This claim is in amplification of a claim previously filed covering the same year and accompanied by an amended return."

IX.

That by certificate of overassessment #953744, Schedule #27861, on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by plaintiff in the amount of $1357.69 by crediting said amount to the taxes due on the fiscal year return for 1918.

That by certificate of overassessment #2,018,772, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $1413.19, reducing the tax liability to $7,092.42. This certificate of overassessment notified plaintiff of the rejection of his claim to the extent of $7092.42 in the following language:

"In the determination of the overassessment your claim for the refund of $9863.30 has been given careful con-

sideration and to the extent not herein allowed was disallowed by the Commissioner as of the date of the schedule above noted."

That except as set forth above the Commissioner of Internal Revenue has refused and failed to refund or credit any taxes and interest overpaid for the fiscal year ended May 31, 1923.

X.

That the taxes heretofore collected from the plaintiff for the fiscal year ended May 31, 1923 and not heretofore refunded are excessive to the extent of $2821.17, for the reasons set forth in the claim for refund heretofore presented to the Commissioner of Internal Revenue, which are the same as the grounds set forth herein as the basis for this proceeding.

XI.

During the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £8756-5-0 Sterling, which, at the rate of $4.55 is the equivalent of $59,886.44 in United States currency. The Commissioner of Internal Revenue has determined that the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1923 was 56.584 per centum of the total net income of plaintiff. Accordingly, under Section 234 of the Revenue Act of 1921, plaintiff is entitled to a total deduction on account of said British income taxes of 56.584 per centum of $59,886.44, or a net amount of $22,569.34. That the revised net income of plaintiff after such deduction would be $34,170.04, and the total tax

thereon would be $4,271.25. In determining the taxes heretofore paid by plaintiff for the fiscal year ended May 31, 1923, the Commissioner of Internal Revenue has not allowed any deductions on account of said British income taxes.

XII.

That the defendant erroneously and illegally collected from the plaintiff and is erroneously and illegally withholding from plaintiff and is indebted to said plaintiff in the total amount of $2821.17, with interest thereon as prescribed by law, representing amounts illegally exacted from plaintiff on account of income taxes for the fiscal year ended May 31, 1923.

XIII.

That although often demanded the defendant has not nor has anyone on his behalf repaid or refunded said sum or sums or any part thereof, and said claim of said plaintiff herein is the sole property of plaintiff and has not been sold or assigned or transferred to any person or individual.

WHEREFORE, plaintiff prays for judgment against the defendant, Rex B. Goodcell, in the amount of $2821.17, together with interest at 6 per centum from dates of payment as provided by law.

Joseph D. Peeler.
Melvin D. Wilson
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

CHARLES DRADER and R. W. STEPHENS being first duly sworn, on oath depose and say:

That The Kern River Oilfields of California, Ltd., plaintiff herein, is a corporation organized under the laws of Great Britain, with its principal office and place of business at Los Angeles, California.

That said CHARLES DRADER and R. W. STEPHENS are its attorneys-at-law and in-fact in charge of its business in the United States and duly authorized to verify this complaint. That they have read the complaint and that the facts contained therein are true to the best of their knowledge and belief.

Charles Drader
R. W. Stephens

Subscribed and sworn to before me this 6th day of November, A. D. 1930.

[Seal] Ethel E. Jones
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 6, 1930 R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Rex B. Goodcell, and in answer to the above-entitled complaint admits, alleges and denies, to-wit:

I.

Denies specifically each and every allegation contained in paragraph I of said complaint.

II.

Admits each and every allegation contained in paragraph II of said complaint.

III.

Admits each and every allegation contained in paragraph III of said complaint.

IV.

Admits each and every allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V, the defendant admits that the plaintiff filed its corporation income tax returns for the fiscal year ended May 31, 1923, and further admits that plaintiff filed its corporation income tax returns for the fiscal year ended May 31, 1923 on August 15, 1923, November 14, 1923 and April 6, 1926, respectively.

Denies specifically each and every other allegation contained in said paragraph.

VI.

Answering paragraph VI, defendant admits that the taxes shown on the returns filed for the fiscal year ended May 31, 1923, were paid in the amounts and on the dates as alleged in said paragraph. Denies specifically that said payments, or any of them, were made under protest and duress.

VII.

Admits the allegations contained in paragraph VII of said complaint.

VIII.

Admits each and every allegation contained in paragraph VIII of said complaint.

IX.

Admits each and every allegation contained in paragraph IX of said complaint.

X.

Denies specifically each and every allegation contained in paragraph X of said complaint.

XI.

Answering paragraph XI, defendant admits that during the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain an income tax, but avers that the amount thereof was £8766-5-0 Sterling instead of £8756-5-0 Sterling, which at the rate of $4.55 is the equivalent of $39,886.44 instead of $59,-886.44, as alleged in said paragraph. The defendant further admits that the Commissioner of Internal Revenue determined that the income of plaintiff from sources with-

in the United States during the fiscal year ended May 31, 1923, was 56.584 per centum of the total net income of plaintiff, and admits that the Commissioner has not allowed any deduction from income on account of said taxes paid to said British Government. Further answering said paragraph, the defendant specifically denies that said taxes, or any part thereof, are allowable as a deduction under Section 234 of the Revenue Act of 1921, as alleged.

Denies specifically each and every other allegation contained in said paragraph.

XII.

Denies specifically each and every allegation contained in paragraph XII of said complaint.

XIII.

Answering paragraph XIII, the defendant admits that the amount herein sought to be recovered, has not been repaid or refunded to plaintiff.

Denies specifically each and every other allegation contained in said paragraph.

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint and that defendant have his costs of suit.

SAMUEL W. McNABB,
United States Attorney,

Ignatius F. Parker,
IGNATIUS F. PARKER,
Assistant United States Attorney,

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

Alva C. Baird
ALVA C. BAIRD,
Special Attorney,
Bureau of Internal Revenue.

Richard W. Wilson
RICHARD W. WILSON,
Special Attorney,
Bureau of Internal Revenue.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

REX B. GOODCELL, being first duly sworn, deposes and says: That he is the defendant named in the within entitled action and is the identical person designated in the title thereof as former Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

Rex B. Goodcell
Rex B. Goodcell.

Subscribed and sworn to before me this 30th day of December, 1930.

[Seal] J. M. Kugler
Notary Public.

[Endorsed]: Filed Dec. 30, 1930 R. S. Zimmerman, Clerk, By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION WAIVING JURY

IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

DATED: April 27, 1931.

MILLER, CHEVALIER, PEELER & WILSON

By Joseph D. Peeler

Attorneys for Plaintiff.

Samuel W. McNabb

SAMUEL W. McNABB,

United States Attorney

Ignatius F. Parker

IGNATIUS F. PARKER,

Assistant United States Attorney

Richard W. Wilson

RICHARD W. WILSON,

Special Attorney for the Bureau of Internal Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AND ORDER CONSOLIDATING CASES FOR TRIAL.

It is hereby stipulated by and between the plaintiff and defendant above named, through their respective attorneys, that the above-entitled cause may be consolidated for trial with the case of The St. Helens Petroleum Company, Ltd. v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, case #4252-C, which is set for trial on the 28th day of April, 1931.

This stipulation is entered into for the reason that the above cases are so similar in fact and law that it would be a waste of time for the court and the parties concerned to try the cases separately.

Feb. 24, 1931

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

Richard W. Wilson,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

ORDER

Upon reading the above stipulation and good cause appearing therefor, the court hereby transfers the above-entitled cause to the trial calendar and department of the Honorable Judge Cosgrave.

Paul J. McCormick

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

CONSENT

Upon reading the above stipulation and the order of the Honorable Judge McCormick appearing above, I hereby consent to and accept the transfer of the above cause to my department.

Geo. Cosgrave

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

ORDER

Upon reading the above stipulation and the above order and consent transferring the above-entitled cause to the Honorable Judge Cosgrave's department, the court hereby consents and orders that the above cases be consolidated for trial before the Honorable Judge Cosgrave on the 28th day of April, 1931.

Geo. Cosgrave,

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

[Endorsed]: Filed Feb 25, 1931 R. S. Zimmerman, Clerk. By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureal of Internal Revenue, and Richard W. Wilson Esq., Special Attorney Bureau of Internal Revenue; and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oilfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the defendant, as Collector of Internal Revenue, its corporation income tax returns for the fiscal year ended May 31, 1923 on, to-wit, August 15, 1923, November 14, 1923, and April 6, 1926.

III.

That the plaintiff paid to the defendant, as Collector of Internal Revenue, upon demand, the taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1923	$1,562.50
November 14, 1923	3,382.70
February 15, 1924	2,452.28
May 15, 1924	2,465.82
Total—	$9,863.30

IV.

That on April 6, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid for the fiscal year ended May 31, 1923, in the manner and form provided by law, covering the issues raised in the complaint herein.

V.

That on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by plaintiff in the amount of $1,357.69 by crediting said amount to taxes due on the fiscal year return for 1918. That on or about March 5, 1929 the Commissioner of Internal Revenue allowed a refund of $1,413.19, rejecting the claim for refund to the extent of $7,092.42.

VI.

That during the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £8766-5-0 Sterling which, at the rate of $4.55, was the equivalent of $39,886.44 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1923, was 56.584 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,569.34. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $22,567.34 on account of said British income taxes.

VII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1923.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 31, 1923, in the amount of $22,569.34, for the income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of

net income computed without the allowance of said deduction.

The Court determines that the defendant Rex B. Goodcell erroneously and illegally collected from plaintiff the sum of $2821.17, and that the plaintiff is entitled to recover from defendant the sum of $2821.17, together with interest thereon at the rate of six per cent on $2157.22 from February 15, 1924, and on $663.95 from November 14, 1923, as provided by law.

That the plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

Approved as to form according to Rule 44

Eugene Harpole
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 4256-M.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant.	)	

JUDGMENT ON FINDINGS

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California,

Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of plaintiff in accordance with said findings;

NOW, THEREFORE, by virtue of the law, and by reason of the findings aforesaid, it is considered by the Court that the plaintiff have judgment in the amount of $2821.17, together with interest at the rate of six per cent on $2157.22 from February 15, 1924, and on $663.95 from November 14, 1923, as provided by law, with costs taxed at $20.00

Judgment rendered this 8th day of November, 1933.

Geo. Cosgrave
United States District Judge.

CERTIFICATE OF PROBABLE CAUSE

The Court certifies that the defendant, Rex B. Goodcell, as Collector of Internal Revenue, exacted and received payment of the monies recovered herein in the performance of his official duty, and that there was probable cause for the act done by the defendant, and that he was acting under the directions of the Secretary of the Treasury, or other proper officer of the Government.

Geo. Cosgrave
United States District Judge.

Approved as to form as required by Rule 44.

Peirson M. Hall
Peirson M. Hall, E.H.
United States Attorney.

Ignatius F. Parker,
Ignatius F. Parker, E. H.
Assistant United States Attorney.

Alva C. Baird
Alva C. Baird, E. H.
Assistant United States Attorney.

ATTORNEYS FOR DEFENDANT.

Joseph D. Peeler
Joseph D. Peeler,

ATTORNEY FOR PLAINTIFF

JUDGMENT ENTERED NOVEMBER 8th, 1933
R. S. ZIMMERMAN, Clerk,
By Francis E. Cross, Deputy.

[Endorsed]: Filed Nov. 8 - 1933. R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	
Plaintiff and Appellee,	Law No. 4256-M.
vs.	
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	
Defendant and Appellant.	

BILL OF EXCEPTIONS

Be it remembered that heretofore to-wit, on the 28th day of April, 1931, the above-entitled cause came on regularly for trial at Los Angeles, California, upon the issues joined herein before his Honor, George Cosgrave sitting as Judge of the above-entitled Court, without a jury, a jury having been duly waived by the parties by written Stipulation as follows:

"IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

"Dated: This 8th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON,

BY JOSEPH D. PEELER,

Joseph D. Peeler

Attorneys for Plaintiff.

Samuel W. McNabb,

Samuel W. McNabb,

United States Attorney,

Ignatius F. Parker,

Ignatius F. Parker,

Assistant U. S. Attorney,

Attorneys for Defendant".

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	
–v–	
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 4256-M

STIPULATION OF FACTS.

It is hereby stipulated and agreed by the parties, plaintiff and defendant, in this action, by their respective counsel, that the following statements of fact are true and correct, and shall be accepted and used as agreed evidence in this case, provided, however, that nothing herein shall prevent either party from introducing other and further evidence, not inconsistent herewith.

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the defendant, as Collector of Internal Revenue, its corporation income tax returns for the fiscal year ended May 31, 1923 on, to-wit, August 15, 1923, November 14, 1923, and April 6, 1926.

III.

That the plaintiff paid to the defendant, as Collector of Internal Revenue, upon demand, the taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1923	$1,562.50
November 14, 1923	3,382.70
February 15, 1924	2,452.28
May 15, 1924	2,465.82
Total	$9,863.30

IV.

That on April 6, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid for the fiscal year ended May 31, 1923, in the manner and form shown by photostatic copy herewith, marked Exhibit 5.

V.

That by certificate of overassessment #953744, Schedule #27861, on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by plaintiff in the amount of $1,357.69 by crediting said amount to taxes due on the fiscal year return for 1918.

VI.

That by certificate of overassessment #2,018,772, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $1,413.19, reducing the tax liability to $7,092.42. Said certificate of overassessment notified plaintiff of the rejection of its claim for refund to the extent of $7,092.42.

VII.

That during the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £8766-5-0 Sterling which, at the rate of $4.55, was the equivalent of $39,886.44 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1923 was 56.584 per centum of the total net income of plaintiff from all sources during said year. Plaintiff contends, and defendant denies, that plaintiff is entitled to a deduction, in determining its taxable net income, of the income taxes so accrued and paid to the Government of Great Britain; but it is agreed that if said taxes are deductible, the amount of said deduction for the fiscal year ended May 31, 1923 is $22,569.34. It is also stipulated that plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year in amount of at least $22,569.34, on account of said British income taxes.

VIII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1923, and that, except as set forth in paragraphs V and VI, above, no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for the fiscal year ended May 31, 1923.

Joseph D. Peeler,
Miller, Chevalier, Peeler & Wilson,
Counsel for Plaintiff.

Samuel W. McNabb,
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

Richard W. Wilson
Richard W. Wilson,
Special Attorney, Bureau of Internal Revenue.

Approved:

.....
United States District Judge.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk

Messrs. Miller, Chevalier, Peeler & Wilson by Joseph D. Peeler, Esq. appeared for plaintiff, and the defendant appeared by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker and Louis Somers, Assistant United States Attorneys for said District, and Richard W. Wilson, Special Attorney, Bureau of Internal Revenue, and the parties introduced in evidence a Stipulation as to certain facts, which had been agreed upon by both parties, which Stipulation (omitting the Exhibits therein referred to) is as follows:

Thereupon the respective parties having rested, plaintiff by its counsel, moved for judgment on the record and asked for special Findings of Fact, and the defendant, by his counsel, moved for judgment for the defendant on the oral and documentary evidence introduced. The Court reserved its ruling on said motions until the final decision of the case.

Counsel for the respective parties thereupon entered into the following Stipulation in open Court:

"MR. PEELER: There is just one thing I overlooked, and should have stated. This involves British cases and British law, and by agreement, we have not attempted to put into evidence the British law or the British cases. I don't know whether the court will take judicial notice of them automatically or not, but we would like to stipulate that the court may take judicial notice of the British law incorporated in the briefs of counsel.

"MR. WILSON: That is agreeable to the Government, your Honor.

"THE COURT: Very well."

Pursuant to said Stipulation made in open Court, the plaintiff in its opening Brief cited the following British cases and British law:

Act of 1842, Section 54.

British Income Tax 1918, Schedule D, Par. 359.

British Income Tax 1918, Schedule D, Par. 394.

General Rules, Paragraph 420.

General Rules, Paragraph 439.

Law of Income Tax, E. M. Konstam, K. C., 1923.

Bradbury v. English Sewing Cotton Company, Ltd., (1922) 2 K. B. 589.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Gold Fields American Development Company, Ltd., v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times 14 (1926).

Rex v. Purdie (1914) 3 K. B. 112, 111 Times Law Reports 531.

Sheldrick v. South African Breweries, Ltd. (1923) 1 K. B. 173. at 191.

Defendant cited British cases and British law as follows in his Brief:

Ashton Gas Company v. Attorney General (1906) 75 L. J. Ch. 1, 93 L. T. 676.

Bart, Sir Marcus Samuel, v. The Commissioner of Inland Revenue, 34 T. L. R. 552 (Vol. 7, Great Britain Tax Cases, p. 27)

Brooke v. Commissioners of Inland Revenue (7 T. C. 261) (1918) 1 K. B. p. 257.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Mylam (Surveyor of Taxes) v. The Market Harborough Advertiser Company, Ltd., 21 T. L. R. 201, Great Britain Tax Cases, Vol. 5, p. 95.

Scottish Union and National Insurance Company v. New Zealand and Australian Land Company (1921), 1 App. Cas. 172.

Sheldrick v. South African Breweries, Ltd. (1923), 1 K. B. 173.

"Income Tax", F. G. Underhay.

"The Law of Income Tax", Second Edition, E. M. Konstam, K. C.

Report of Commissioner of Inland Revenue for the fiscal year ended March 31, 1922.

"Taxation of Business in Great Britain", Department of Commerce, Trade Promotion Series, No. 60, p. 65.

Great Britain:

Income Tax Act 1918 and Finance Acts 1919 to 1925, Inc.

Schedule D, paragraph 359.

Schedule D, paragraph 394,

Section 237, Act of 1918.

General Rules, paragraph 420.

General Rules, paragraph 439.

General Rules, paragraph 442.

In its Reply Brief, plaintiff cited British law and British cases as follows:

Konstam, Income Tax, pp. 19 and 20.

Ashton Gas Company v. Attorney General, 75 L. J. Ch. 1.

Bradbury v. English Sewing Cotton Co., Ltd. 2 K. B. 589.

Commissioners v. Blott, 2 A. C. 171.

Gold Fields American Development Company, Ltd. v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times, 14.

Ritson v. Phillips, 131 L. T. 384; 9 Tax Cas. 10.

Briefs were filed and the cause submitted for decision. Thereafter and on the 21st day of September, 1933, the Court made the following Minute Order:

At a stated term, to wit: The SEPTEMBER Term, A. D. 1933, of the District Court of the United States of America, within and for the CENTRAL Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES on THURSDAY the 21st day of SEPTEMBER in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable GEO. COSGRAVE District Judge.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	Nos. 4252 4255
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue.	Nos. 4258-H 4045-H (Dismissed)
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue, Defendant.	Nos. 4253-M 4256-M 4257-J Law
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4254-J Law

These consolidated causes having under date of April 28, 1931 come before the Court for hearing, and having been ordered submitted on Stipulation of Facts filed and briefs to be filed, and briefs having been filed, and the Court having duly considered the matter, it is now by the Court ordered:

"The question presented in this case is whether, in computing its net taxable income, a foreign corporation is entitled to deduct income taxes paid a foreign country when such taxes so paid were, as permitted by the laws of the foreign country, deducted from dividends paid to its stockholders. The Revenue Act applicable to the years involved in clear language allows such deduction. but the government maintains that since the corporation is empowered to deduct from the dividends payable to its stockholders the amount of such tax, it does not come within the meaning of the Revenue Act.

"I think the position of the government is not well-founded. The foreign corporation in the express language of the Revenue Act is entitled to a deduction of such payments and I regard as entirely incidental the circumstance that under the laws of the foreign country the corporation is entitled to credit to the tax so paid when it comes to paying dividends to its shareholders. The interpretation sought by the government would change a/provision ~~statute~~ of a statute in which there is no ambiguity whatever. This may not be done. (Gould v. Gould, 245 U. S. 151).

Judgment is therefore ordered in favor of the plaintiffs with exception to defendant."

On the 8th day of November, 1933, defendant filed and presented the following Request for Findings of Fact and Conclusions of Law to the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
vs. Plaintiff,	)	NO. 4256-M.
REX B. GOODCELL, Former Collector of Internal Revenue,	)	
Defendant.	)	

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the Defendant above-named, by and through his attorney, Peirson M. Hall, United States Attorney for the Southern District of California, Ignatius F. Parker and Alva C. Baird, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and hereby requests the Court

that in rendering and making its judgment in the above-entitled cause, which has been submitted to the Court, said Court make specific findings of fact and conclusions of law upon the issues included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant.

Presented and rejected.

Geo. Cosgrave,
Judge.

FINDINGS OF FACT.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

CONCLUSIONS OF LAW.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

II.

That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause.

Dated: This.....day of....., 1933.

.....

UNITED STATES DISTRICT JUDGE

Approved as to form as provided by Rule 44:

.....

.....

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 8, 1933. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

And Plaintiff presented the following Findings of Fact and Conclusions of Law to the Court on the said 8th day of November, 1933:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,

vs.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.

No. 4256-M

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received

and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oilfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with the defendant, as Collector of Internal Revenue, its corporation income tax returns for the fiscal year ended May 31, 1923 on, to-wit, August 15, 1923, November 14, 1923, and April 6, 1926.

III.

That the plaintiff paid to the defendant, as Collector of Internal Revenue, upon demand, the taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1923	$ 1,562.50
November 14, 1923	3,382.70
February 15, 1924	2,452.28
May 15, 1924	2,465.82
Total—	$ 9,863.30

IV.

That on April 6, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid for the fiscal year ended May 31, 1923, in the manner and form provided by law, covering the issues raised in the complaint herein.

V.

That on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by plaintiff in the amount of $1,357.69 by crediting said amount to taxes due on the fiscal year return for 1918. That on or about March 5, 1929 the Commissioner of Internal Revenue allowed a refund of $1,413.19, rejecting the claim for refund to the extent of $7,092.42.

VI.

That during the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £8766-5-0 Sterling which, at the rate of $4.55, was the equivalent of $39,886.44 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1923, was 56.584 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,569.34. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $22,567.34 on account of said British income taxes.

VII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1923.

CONCLUSIONS OF LAW.

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year

ended May 31, 1923, in the amount of $22,569.34; for the income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deduction.

The Court determines that the defendant Rex B. Goodcell erroneously and illegally collected from plaintiff the sum of $2821.17, and that the plaintiff is entitled to recover from defendant the sum of $2821.17, together with interest thereon at the rate of six per cent on $2157.22 from February 15, 1924, and on $663.95 from November 14, 1923, as provided by law.

That the plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United State District Judge.

Approved as to form according to Rule 44
EUGENE HARPOLE
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

Whereupon the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the Plaintiff, and adopted, made and entered the same as its Findings of Fact and Conclusions of Law herein and rejected the Findings of Fact and Conclusions of Law requested by the defendant to which the defendant noted an exception and on the 24th day of November, 1933, the following Order was duly made and entered by the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, Ltd., a Corporation, Plaintiff, vs. REX B. GOODCELL, former Collector of Internal Revenue, Defendant.	No. 4256-M. ORDER ALLOWING EXCEPTIONS

IT IS ORDERED that exception in favor of the defendant, to the Court's action in adopting and entering the Conclusions of Law and Judgment presented by the plaintiff and in refusing to adopt the Findings of Fact and Conclusions of Law presented by the defendant, be entered on the minutes of the court as of the 8th day of November, 1933, by the Clerk, nunc pro tunc.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE

Approved as to form under
Rule 44 and no objection
offered to entry of the Order.

Joseph D. Peeler
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 24, 1933. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Plaintiff, Appellee, and Defendant, Appellant, that the foregoing Bill of Exceptions contains all evidence given and proceedings had in the trial of this action material to the Appeal of defendant, and that it may be approved, allowed and settled by the Judge in the above-entitled Court as correct in all respects; that the same shall be made a part of the record in said case and be the Bill of Exceptions therein and that said Bill of Exceptions may be used by either plaintiff or defendant upon any Appeal taken by plaintiff or defendant, and that said Bill may be certified and signed by the Judge upon presentation of this Stipulation without further notice to either party hereto or to their respective counsel.

Dated: This 26th day of April, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

BY Joseph D. Peeler
Attorneys for Plaintiff and Appellee.

Peirson M. Hall D
PEIRSON M. HALL,
United States Attorney,

Robert W. Danields,
ROBERT W. DANIELS,
Asst. U. S. Attorney,

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant U. S. Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS

The *following* Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties plaintiff or defendant upon any appeal taken by either party plaintiff or defendant.

Dated: This 27th day of April, 1934.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including the 8th day of February, 1934.

Dated: November 15, 1933.

Geo. Cosgrave,
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Nov. 15, 1933 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TERM and Time.

Upon motion of the Defendant, and good cause appearing therefor,

IT IS ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Time and the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including May 8, 1934. and the time therefor is extended accordingly.

DATED: FEBRUARY 7, 1934.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Feb 7-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL FROM JUDGMENT ENTERED NOVEMBER 8, 1933.

TO THE ABOVE ENTITLED COURT AND TO HONORABLE GEORGE COSGRAVE, JUDGE THEREOF:

Your petitioner, the defendant in the above-entitled case, feeling aggrieved by the judgment as entered herein in favor of said plaintiff on November 8, 1934, prays that this Appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided, and in connection with this petition petitioner hereby presents Assignment of Errors dated February 8th, 1934.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney.

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney,

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff, vs.	)	No. 4256-M.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	)	ASSIGNMENT OF ERRORS.

The Defendant and appellant above-named makes and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal from the judgment of this Court entered therein on the 8th day of November, 1933:

I.

That the Court erred in rendering judgment against the defendant and in favor of the plaintiff in the amount of $2,821.17, together with interest at the rate of six (6%) per cent on $2,157.22 from February 15, 1924, and on $663.95 from November 14, 1923 with costs taxed at $20.00, in that the evidence introduced herein and the

facts found therefrom by the Court and the record in this cause are insufficient to support a judgment in favor of the plaintiff in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the Court and the record disclose that plaintiff is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1923 accrued and paid to the Government of Great Britain an income tax equivalent to $39,886.44 in United States currency; and that the plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,569.34, on account of said British income taxes.

II.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff herein for the reason that said judgment is not supported by the facts found by the Court herein for the reason that the Court found as a fact that during the fiscal year ended May 31, 1923, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £8766-5-0 Sterling which, at the rate of $4.55, was the equivalent of $39,886.44 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1923, was 56.584 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $22,569.34. Plaintiff de-

ducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,569.34 on account of said British income taxes.

III.

The Court erred in refusing to adopt the Defendant's Proposed Finding of Fact Number I, which reads as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

IV.

The Court erred in refusing to adopt the Defendant's Proposed Conclusions of Law numbered I and II, which read as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action."

"II.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause",

for the reason that the evidence introduced and the facts found by the Court in this action require the adoption of said Conclusions of Law.

V.

The Court erred in concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to allow the plaintiff a deduction on its income tax return for the fiscal year ended May 31, 1923 in the amount of $22,569.34 for income taxes accrued and paid to the Government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom by the Court disclose that the amount of $22,569.34 so accrued and paid to the Government of Great Britain for income taxes by plaintiff was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1923.

VI.

The Court erred in failing to find and conclude as a matter of law herein that no part of the amount of $22,569.34, accrued and paid by the plaintiff to the Government of Great Britain as an income tax during the fiscal year ended May 31, 1923, and deducted by plaintiff from dividends paid by it to its stockholders during said fiscal year, was deductible from plaintiff's gross income for said year in computing the correct income tax due from it to the Government of the United States.

VII.

The Court erred as a matter of law in not rendering judgment against the plaintiff and in favor of the defendant for his costs and disbursements expended herein.

Dated: This 8th day of February, 1934.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney,

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney,

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL

In the above-entitled action, the defendant having filed its petition for an order allowing it to appeal from the judgment entered in the above-entitled action on November 8, 1933;

It Is Ordered, that said appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed to the defendant, and that a certified transcript of the record, bill of exceptions, exhibits, stipulations and pleadings and all proceedings herein be transmitted to said United States Circuit Court of Appeals.

Dated: This 8th day of February, 1934.

Geo. Cosgrave,
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Feb 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

SECOND AMENDED PRAECIPE.

To: R. S. Zimmerman, Clerk of the United States District Court, Southern District of California:

YOU ARE HEREBY REQUESTED to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. Stipulation Waiving Jury.
5. Stipulation and Order Consolidating Cases for Trial.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated November 15, 1933.
9. Order Extending Term and Time to File Bill of Exceptions, dated February 7, 1934.
10. Petition for Appeal.
11. Assignments of Error on Appeal.
12. Order Allowing Appeal.

13. Bill of Exceptions.
    (a) Stipulation Waiving Jury.
    (b) Stipulation of Facts with Exhibits omitted.
    (c) Stipulation of Counsel in open Court and citations of British Law and Cases.
    (d) Minute Order dated September 21, 1933.
    (e) Defendant's Request for Findings of Fact and Conclusions of Law.
    (f) Plaintiff's Proposed Findings of Fact and Conclusions of Law.
    (g) Order Allowing Exceptions Nunc Pro Tunc.
14. Clerk's Certificate and this Second Amended Praecipe.

Dated: This 26th day of April, 1934.

Peirson M. Hall D.
PEIRSON M. HALL,
United States Attorney.

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney,

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant United States Attorney,

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Appellant and Appellee that the foregoing Second Amended Praecipe may be filed, shall be used in lieu of and replace all Praecipes heretofore filed for the purpose of the preparation of the record upon Appeal in the above-entitled action; that in preparing the record herein, the Clerk of the United States District Court may omit all endorsements except the endorsements of the filing date, from the papers requested in the foregoing Second Amended Praecipe.

MILLER, CHEVALIER, PEELER & WILSON,
BY Joseph D. Peeler

Attorneys for Plaintiff and Appellee.

Peirson M. Hall, D.
PEIRSON M. HALL,
United States Attorney,

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney,

ALVA C. BAIRD,
Assistant United States Attorney,

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 58 pages, numbered from 1 to 58 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; stipulation waiving jury; stipulation and order consolidating cases for trial; special findings of fact and conclusions of law; judgment; bill of exceptions; order extending time within which to serve and file bill of exceptions; order extending term and time to file bill of exceptions; petition for appeal assignment of errors; order allowing appeal, and second amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7491

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

v.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

On Appeal From the District Court of the United States, for the Southern District of California,

BRIEF FOR THE APPELLANT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.
Counsel for Appellant.

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1877

SUBJECT INDEX

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

v.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,
Appellee.

BRIEF FOR THE APPELLANT

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California (R. 35-36), which is not reported.

Jurisdiction

This appeal involves income taxes of The Kern River Oilfields of California, Ltd., a corporation, for the fiscal year ended May 31, 1923 (R. 28), and is taken from a judgment of the District Court in favor of the taxpayer entered November 8, 1933 (R. 22-23). The appeal is brought to this Court by petition for appeal on behalf

of the Collector of Internal Revenue filed February 8, 1934 (R. 49), pursuant to Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a British corporation, doing business in the United States, is entitled to deduct from gross income, income taxes paid to Great Britain when such income taxes were deducted from dividends paid to its stockholders.

2. Whether the judgment is supported by the findings.

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved will be found in Appendices A and B in appellant's brief in the case of *Galen H. Welch, Collector, v. The St. Helens Petroleum Company, Ltd., a corporation,* No. 7488, now pending before this Court.

Statement

The facts were stipulated. (R. 27-34.) The appellee is a corporation organized under the laws of Great Britain, having an office and place of business at Los Angeles, California (R. 27), whose income from sources within the United States during the fiscal year ended May 31, 1923, was 56.584 per centum of its total income from all sources during that year (R. 29).

During the fiscal year ended May 31, 1923, appellee accrued and paid to the government of Great Britain an income tax amounting to £8,766-5-0 Sterling which, at

the rate of $4.55, was the equivalent of $39,886.44 in United States currency, of which appellee deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $22,569.34 on account of said British income taxes. (R. 29.)

In its income tax returns for the fiscal year ended May 31, 1923, appellee reported a tax due therein of $9,863.30, which was duly assessed and paid to appellee, then Collector of Internal Revenue for the Sixth Collection District of California. (R. 28.)

On or about April 6, 1926, appellee filed with the Commissioner of Internal Revenue a claim for refund of $1,090.70 of the tax paid for the fiscal year ended May 31, 1923, claiming that said appellee had inadvertently omitted to include certain expenses incurred by its London office. (R. 6.) Thereafter, on or about August 15, 1927, appellee filed with the Commissioner of Internal Revenue a claim for refund of $9,863.30, being the whole of the tax paid for the same fiscal year, claiming additional deductions of £150-0-0 on account of California audit fee; £202-2-0 on account of travelling expenses; £8,609-19-8 on account of administration expense; £9,395-12-5 on account of British income taxes deducted from dividends received; and £8,766-5-0 on account of British income taxes (representing amounts deducted from dividends paid to its stockholders. (R. 6-7.) The Commissioner allowed appellee's claim for refund to the extent of $2,770.88, and rejected it to the extent of $7,092.42. (R. 28-29.) No other deductions were claimed by appellee in its claim for refund (Ex. 5), or in the complaint (R. 4-10). The Com-

missioner has allowed no deduction on account of said British income tax for the fiscal year ended May 31, 1923. (R. 30.) Appellee contended, and appellant denied, that appellee was entitled to such deduction, but it was agreed that if said British income taxes were deductible, the amount of such deductions for the fiscal year ended May 31, 1923, was $22,569.34. (R. 29.) This amount was allowed as a deduction by the court. (R. 20-21, 42-43.)

Upon the basis of the disallowance by the Commissioner of appellee's claim for refund to the extent of $7,092.42 (R. 29), this suit was commenced on November 6, 1930, for the recovery of $2,821.17 (R. 4-10).

By stipulation a jury was waived, and the case was tried by the court without the intervention of a jury. (R. 26.) At the close of all the evidence, counsel for appellant moved for judgment in favor of the appellant (R. 31), and on September 21, 1933, the court, by minute entry ordered judgment in favor of the appellee (R. 35-36). The appellant filed requests for special findings of fact and conclusions of law (R. 37-38), which were denied by the court (R. 43). The findings adopted by the court (R. 18-21) were those requested by the appellee (R. 39-43).

The court held that the appellee was entitled to a deduction of $22,569.34 on account of dividends paid to the government of Great Britain and deducted from dividends to its stockholders (R. 20-21), and on this basis rendered judgment for the appellee for $2,821.17 (R. 22-23). From the judgment for appellee the appellant has appealed. (R. 49.)

Specification of Errors to be Urged

The court erred (R. 50-54):

1. In rendering judgment against the appellant and in favor of the appellee in the amount of $2,821.17, together with interest at the rate of six (6%) per cent on $2,157.22 from February 15, 1924, and on $663.95 from November 14, 1923, with costs taxed at $20, in that the evidence herein and the facts found therefrom by the court and the record in this cause are insufficient to support a judgment in favor of the appellee in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the court and the record disclose that appellee is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1923, accrued and paid to the government of Great Britain an income tax equivalent to $39,886.44 in United States currency; and that the appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,569.34, on account of said British income taxes.

2. In rendering judgment against the appellant and in favor of the appellee herein for the reason that said judgment is not supported by the facts found by the court herein for the reason that the court found as a fact that during the fiscal year ended May 31, 1923, appellee accrued and paid to the government of Great Britain an income tax in the amount of £8,766-5-0 Sterling which, at the rate of $4.55, was the equivalent of $39,886.44 in United States currency. The income of appellee from sources within the United States during the fiscal year

ended May 31, 1923, was 56.584 per centum of the total net income of appellee from all sources during said year. The amount of the British income tax allocable to United States income was $22,569.34. Appellee deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $22,569.34 on account of said British income taxes.

3. In refusing to adopt the appellant's Proposed Finding of Fact Number I, which reads as follows (R. 52):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

4. In refusing to adopt the appellant's Proposed Conclusions of Law numbered I and II, which read as follows (R. 52):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.
>
> "That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above entitled cause,"

for the reason that the evidence introduced and the facts found by the court in this action require the adoption of said Conclusions of Law.

5. In concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to

allow the appellee a deduction on its income tax return for the fiscal year ended May 31, 1923, in the amount of $22,569.34 for income taxes accrued and paid to the government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom by the court disclose that the amount of $22,569.34 so accrued and paid to the government of Great Britain for income taxes by appellee was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1923.

6. In failing to find and conclude as a matter of law herein that no part of the amount of $22,569.34, accrued and paid by the appellee to the government of Great Britain as an income tax during the fiscal year ended May 31, 1923, and deducted by appellee from dividends paid by it to its stockholders during said fiscal year, was deductible from appellee's gross income for said year in computing the correct income tax due from it to the Government of the United States.,

7. In not rendering judgment against the appellee and in favor of the appellant for his costs and disbursements expended herein.

Argument

This appeal involves the identical questions that are presented in the third argument in the brief for the appellant in the case of *Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California v. The St. Helens Petroleum Company, Ltd., a corporation*, No.

7488, now pending before this Court. The appellant's position is fully presented in the brief for the appellant filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellant's brief in *The St. Helens Petroleum Co., Ltd.*, case, No. 7488, are served herewith upon counsel for the appellee.

Conclusion

For the reasons stated in the appellant's brief in *The St. Helens Petroleum Co., Ltd.*, case, No. 7488, it is urged that the decision of the court below in holding that amounts accrued and paid by the appellee to the government of Great Britain as an income tax and deducted by appellee from dividends paid by it to its stockholders during the fiscal year was deductible from appellee's gross income for that year, was erroneous, and should be reversed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.

January, 1935.

No. 7491.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,
Appellee.

BRIEF FOR THE APPELLEE.

JOSEPH D. PEELER,
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Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF STATUTES CITED.

No. 7491.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,
Appellee.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the court below, the District Court of the United States for the Southern District of California, which is unreported, is set forth on pages 35-36 of the Transcript of Record.

JURISDICTION.

This appeal involves income and profits taxes for the fiscal year ended May 31, 1923, and is taken from a judgment of the District Court entered in favor of the taxpayer on November 8, 1933. [R. 18, 22-23.] The appeal is brought to this Court by petition for appeal filed by appellant on February 8, 1934 [R. 49], pursuant to Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

During the taxable year ended May 31, 1923, the appellee paid to Great Britain certain income taxes upon its profits and subsequently deducted a corresponding amount from dividends paid by it to its stockholders during said year. Were such taxes deductible from its gross income for said taxable year? The fundamental question is whether said taxes were imposed by Great Britain upon the corporation's income or upon the dividends paid to its stockholders.

STATUTES INVOLVED.

The applicable provisions of the Federal and British statutes will be found in the appendix attached to the brief filed in Docket No. 7488.

STATEMENT OF FACTS.

All the facts were stipulated. [R. 27-34.] The appellee is a corporation organized under the laws of Great Britain having its principal office and place of business in Los Angeles, California. [R. 27.] During the fiscal year ended May 31, 1923, it accrued and paid to the Government of Great Britain an income tax in amount, converted into United States currency, of $39,886.44. [R. 29.] During the same fiscal year its income from sources within the United States was 56.584 per cent of its total net income from all sources. [R. 29.] Appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $22,569. 34, on account of said British taxes. [R. 29.] The parties hereto stipulated and agreed that if the plaintiff is entitled to a deduction, in determining its taxable net income, of income taxes so accrued and paid to Great Britain, the amount of said deduction for the fiscal year ended May 31, 1923, is $22,-569.34. [R. 29.] The Commissioner of Internal Revenue allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1923. [R. 30.]

In its tax returns for the fiscal year ended May 31, 1923, appellee reported total taxes in the amount of $9,-863.30, which was duly assessed and paid to appellant as Collector of Internal Revenue. [R. 28.]

Within the period and in the manner provided by law, appellee filed with the Commissioner of Internal Revenue a claim for refund, setting forth therein the same grounds alleged in its Complaint in the present proceeding. [R. 6-10, 12, 28, 41.] The Commissioner of Internal Revenue rejected said claim for refund and appellee filed its complaint in the present proceeding. [R. 4-10, 29.]

By stipulation a jury was waived and the case was tried by the Court without the intervention of a jury. [R. 15, 26.] The parties filed with the Court a stipulation of facts, in which they stipulated the facts, as set forth above, relative to the income taxes paid to the Government of Great Britain, leaving for determination by the Court the question of deductibility. [R. 29.] At the close of all the evidence, counsel for each party moved for judgment on the record. [R. 31.] On September 21, 1933, the Court, by minute order, ordered judgment in favor of appellee. [R. 35-36.] Appellant filed requests for special findings of fact and conclusions of law, which were rejected by the Court. [R. 37-38, 43.] The Court accepted and adopted the findings and conclusions of law requested by appellee. [R. 18-19, 39-43]. The Court determined that the Commissioner had erred in refusing to allow to appellee a deduction from income for the fiscal year ended May 31, 1923, in the amount of $25,569.34 for British income taxes, and in levying tax assessments on the basis of net income computed without the allowance of said deductions. [R. 20-21.] On this basis, the Court rendered judgment for the appellee for $2,821.17, with interest as provided by law. [R. 22-23.] From this judgment for appellee, the appellant has appealed. [R. 49.]

PRELIMINARY STATEMENT.

At the trial below, six associated cases were consolidated for trial, all being suits against present or former collectors of internal revenue for income or income and profits taxes alleged to have been erroneously collected. In each of these cases, judgment was entered by the Court in favor of the taxpayer, and all, upon appeal, have been set for argument together before this Court. Following is a list of these cases, showing the Docket No. in this Court, the names of the parties, and the fiscal year involved.

Docket No.	Taxpayer (Appellee)	Collector (Appellant)	Fiscal Year Ended May 31
7488	The St. Helens Petroleum Co., Ltd.	Galen H. Welch	1921
7490	" " " " "	" "	1922
7493	" " " " "	Rex B. Goodcell	1922
7491	The Kern River Oilfields of Cal., Ltd.	" " "	1923
7492	" " " " "	" " "	1924
7489	" " " " "	" " "	1925

Dockets 7490 and 7493 involved the same taxpayer, the same taxable year, and the same issues, with separate suits being brought and separate judgments being rendered against two successive collectors of internal revenue because a part of the tax in controversy was paid to each of them.

The issue involving the deductibility of British income taxes is involved in *all* of these cases and was the only issue presented by the parties at the trial below, the other issues raised by the pleadings having been conceded by appelants in the stipulations filed at the trial. [R. 36.]

The other issue, involved only in Docket Nos. 7488, 7490, and 7493, is the jurisdiction of the trial court to enter judgment in any case where the profits taxes have

been determined under Section 328, Revenue Acts of 1918 and 1921. As Congress did not impose any profits tax for any period after December 31, 1921, this issue naturally is not presented in Docket Nos. 7489, 7491 and 7492.

Appellants have presented their full arguments on both issues in the brief filed in Docket No. 7488, and have merely referred to said brief in the briefs presented in all other cases. As a matter of convenience and to avoid confusion, the same procedure is being followed by appellees. Accordingly the full statement of argument on both issues will be presented in the brief filed under Docket No. 7488.

SUMMARY OF ARGUMENT.

Under the Federal Revenue Acts of 1918 and 1921, the deduction for taxes (including income taxes paid to a foreign Government) is allowable to the one on whom the taxes were imposed and by whom they were paid. It has been stipulated and found by the Court that the British income tax of $22,569.34, in issue here, was paid to the British Government by the appellee. [R. 29.] It is clear that, under British law, this tax was imposed on appellee, was determined on the basis of its net income, and was payable in any event, even though no dividends might ever be declared to its shareholders.

There is no British income tax on dividends as such. In paying the British income tax, appellee did so as a taxpayer and not as an agent for its shareholders. The mere fact that it was permitted, though not required, under the British practice, to deduct from dividends paid, if any, a proportionate amount of the tax, does not change the fact that it paid the taxes on its own behalf as a tax-

payer. Such deductions from dividends did not result in any reimbursement to appellee of its own income tax payment; having paid the tax, its income available for dividends was merely the lesser sum.

To speak of the payment of the income tax by appellee as a "withholding" is simply a misnomer contrary to facts. It was required to pay the tax to the British Government on *its* entire net income even though (1) it made no payment whatever to its stockholders and (2) the stockholders had no income from this or any other source.

The construction contended for by appellant would result in confusion in the administration of our tax laws and often would result in an unfair and unjust duplication of deductions, defeating the collection of tax revenues.

The statute is plain and unambiguous, leaving no need for departmental construction. There has been no uniform and long continued rule of construction by the courts, the Board or the Treasury Department. The informal Bureau rulings relied upon by appellant "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." As a matter of fact, the Bureau's views on this question have changed from time to time. At the present time the Department is contending in various cases before the Board precisely in accordance with appellee's contentions herein.

ARGUMENT.

The detailed argument of appellee on this question is set forth in the brief filed for appellee in the case of *Welch v. St. Helens Petroleum Co., Ltd.,* No. 7488, now pending before this Court, which is included herein by reference.

CONCLUSION.

Appellee submits that for the reasons set forth above the Court below properly held that appellee was entitled to a deduction of $22,569.34 on its income tax return for the fiscal year ended May 31, 1923, on account of income taxes paid during said year to the Government of Great Britain.

Respectfully submitted,

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

No. 7192

United States
Circuit Court of Appeals
For the Ninth Circuit.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Defendant and Appellant:

PEIRSON M. HALL, Esq.,
United States Attorney,

ROBERT W. DANIELS, Esq.,
Assistant United States Attorney,

ALVA C. BAIRD, Esq.,
Assistant United States Attorney,

EUGENE HARPOLE, Esq.,
Special Attorney,
Bureau of Internal Revenue,
Federal Building,
Los Angeles, California.

For Plaintiff and Appellee:

MILLER, CHEVALIER, PEELER & WILSON, Esqs.,

JOSEPH D. PEELER, Esq.,
Title Insurance Building,
Los Angeles, California.

UNITED STATES OF AMERICA, ss.

TO: THE KERN RIVER OILFIELDS OF CALI-- FORNIA, LTD., a corporation, and To MILLER, CHEVALIER, PEELER & WILSON, its attorneys:

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 8th day of March, A. D. 1934, pursuant to Order Allowing Appeal filed February 8th, 1934, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, vs. REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, No. 4257-C, wherein Rex B. Goodcell, Former Collector of Internal Revenue, is Defendant and Appellant and you are Plaintiff and Appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 8th day of February, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

Receipt is acknowledged of a copy of the within Citation, together with a copy of the Petition for Appeal, Assignments of Error and Order Allowing Appeal herein.

DATED: FEBRUARY 8th, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

By Joseph D. Peeler

Attorneys for Plaintiff.

By D. Champion.

[Endorsed]: Filed Feb 8 –1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	:	
-v-	:	At Law
	:	No. 4257-J
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	:	COMPLAINT

NOW COMES the plaintiff, The Kern River Oilfields of California, Lt., a corporation, and through its attorneys complains of the defendant, Rex B. Goodcell, and as and for a cause of action against said defendant alleges:

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the jurisdiction of this court is dependent upon a Federal question in that the cause arises under the laws of the United States of America pertaining to internal revenue, to-wit, the Revenue Act of 1921 and subsequent Acts.

III.

That the defendant, Rex B. Goodcell, was, from March 6, 1922 to April 5, 1926 inclusive, the Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City of Los Angeles, in said State of California.

IV.

That this action is brought against the defendant as an officer acting under and by virtue of the Revenue Act of 1921 and later Acts on account of acts done under color of his office, and of the Revenue Laws of the United States as will hereinafter more fully appear.

V.

That the plaintiff duly filed with the defendant as the proper officer designated by statute, its corporation income tax returns for the fiscal year ended May 31, 1924 as required by law and within the periods prescribed by law, that is, on to-wit, August 11, 1924, October 14, 1924, and April 6, 1926.

VI.

That the defendant, Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, demanded and exacted payment under protest and duress from the plaintiff, of taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 11, 1924	$4,500.00
October 14, 1924	85.07
November 17, 1924	4,585.07
February 10, 1925	4,585.08
May 8, 1925	4,585.07
Total	$18,340.29

VII.

That on April 17, 1928 plaintiff filed with the Collector of Internal Revenue on the form provided by the Commissioner of Internal Revenue, a claim for refund for the fiscal year ended May 31, 1924, claiming a refund of $18,340.29, setting forth the following reasons for said claim:

"That on January 21st 1928 the taxpayer received a Certificate of Overassessment from Treasury Department bearing symbols IT:C:CC—Number 953814—Schedule #27861

"(1) London Overhead expenses are deductible in full, as expenses are applicable to gross income from the United States.

"(2) Depletion on Section 19 should be based on cost and not on valuation as at March 1, 1913.

"(3) The taxes paid to the British Government on income from sources within the United States are deductible from gross income.

"A schedule is attached showing that a net loss accrued in the year in question to the extent of $17,174.23."

VIII.

That by certificate of overassessment #953814, Schedule #27861, on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by the plaintiff in the amount of $1,367.92, by crediting said amount to the taxes due on the fiscal year return for 1918.

That by certificate of overassessment #2,047,605, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $2,386.79, reducing the tax liability to $14,585.58. This certificate of overassessment notified plaintiff of the rejection of his claim to the extent of $14,585.58 in the following language:

"In the determination of this overassessment your claim for the refund of $18,340.29 has been given careful consideration and to the extent not herein allowed was disallowed by the Commissioner as of the date of the schedule above noted."

That except as set forth above the Commissioner of Internal Revenue has refused and failed to refund or

credit any taxes and interest overpaid for the fiscal year ended May 31, 1924.

IX.

That the taxes heretofore collected from the plaintiff for the fiscal year ended May 31, 1924 and not heretofore refunded are excessive to the extent of $6,563.47, for the reasons set forth in the claim for refund heretofore presented to the Commissioner of Internal Revenue, which are the same as the grounds set forth herein as the basis for this proceeding.

X.

That during the fiscal year ended May 31, 1924, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40 is the equivalent of $68,540.00 in United States currency. The Commissioner of Internal Revenue has determined that the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1924 was 76.61 per centum of the total net income of plaintiff. Accordingly, under Section 234 of the Revenue Acts of 1921 and 1924, plaintiff is entitled to a total deduction on account of said British income taxes of 76.61 per centum of $68,540.00 or a net amount of $52,507.73. That the revised net income of plaintiff after such deduction would be $66,014.11 under the Revenue Act of 1921, and $61,604.80 under the Revenue

Act of 1924. That the total taxes under both Acts for the fiscal year ended May 31, 1924 would be $8,022.11. In determining the taxes heretofore paid by plaintiff for the fiscal year ended May 31, 1924, the Commissioner of Internal Revenue has not allowed any deductions on account of said British income taxes.

XI.

That the defendant erroneously and illegally collected from the plaintiff and is erroneously and illegally withholding from plaintiff and is indebted to said plaintiff in the total amount of $6,563.47, with interest thereon as prescribed by law, representing amounts illegally exacted from plaintiff on account of income taxes for the fiscal year ended May 31, 1924.

XII.

That although often demanded the defendant has not nor has anyone on his behalf repaid or refunded said sum or sums or any part thereof, and said claim of said plaintiff herein is the sole property of plaintiff and has not been sold or assigned or transferred to any person or individual.

WHEREFORE, plaintiff prays for judgment against the defendant, Rex B. Goodcell, in the amount of $6,563.47, together with interest at 6 per centum from dates of payment as provided by law.

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

CHARLES DRADER and R. W. STEPHENS being first duly sworn, on oath depose and say:

That The Kern River Oilfields of California, Ltd., plaintiff herein, is a corporation organized under the laws of Great Britain, with its principal office and place of business at Los Angeles, California.

That said CHARLES DRADER and R. W. STEPHENS are its attorneys-at-law and in-fact in charge of its business in the United States and duly authorized to verify this complaint. That they have read the complaint and that the facts contained therein are true to the best of their knowledge and belief.

Charles Drader
R. W. Stephens

Subscribed and sworn to before me this 6th day of November, A. D. 1930.

[Seal] Ethel E. Jones
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 6, 1930 R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Rex B. Goodcell, and in answer to the above-entitled complaint admits, alleges and denies, to-wit:

I.

Denies specifically each and every allegation contained in paragraph I of said complaint.

II.

Admits each and every allegation contained in paragraph II of said complaint.

III.

Admits each and every allegation contained in paragraph III of said complaint.

IV.

Admits each and every allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V of said complaint, the defendant admits that the plaintiff filed its corporation income tax returns for the fiscal year ended May 31, 1924 on August 11, 1924, October 14, 1924, and April 6, 1926.

Denies specifically each and every other allegation contained in said paragraph.

VI.

Answering paragraph VI of said complaint, the defendant admits the allegations therein contained except the

averment that the payment of the taxes therein referred to was made under protest and duress, which allegation the defendant specifically denies.

VII.

Admits each and every allegation contained in paragraph VII of said complaint.

VIII.

Admits each and every allegation contained in paragraph VIII of said complaint.

IX.

Denies specifically each and every allegation contained in paragraph IX of said complaint.

X.

Answering paragraph X of said complaint, the defendant admits that during the fiscal year ended May 31, 1924, the plaintiff accrued and paid to the Government of Great Britain, income taxes in the amount of £15,571-12-6 Sterling; avers that said amount at the rate of $4.40 is the equivalent of $68,540.00, as therein alleged; admits that the Commissioner of Internal Revenue has determined that the income of plaintiff from sources within the United States for said fiscal year was 76.61 per centum of the total net income of plaintiff; admits that the Commissioner of Internal Revenue has not allowed any deductions from plaintiff's income on account of said taxes. Further answering said paragraph X, the defendant specifically denies that said taxes, or any part thereof, are allowable as a deduction from income under Section 234 of the Revenue Acts of 1921 and/or 1924, as alleged by plaintiff in said paragraph.

Denies specifically each and every other allegation contained in paragraph X of said complaint.

XI.

Denies specifically each and every allegation contained in paragraph XI of said complaint.

XII.

Answering paragraph XII of said complaint, defendant admits that no part of the amount sought to be recovered in this action has been paid or refunded to the plaintiff, as alleged therein.

Denies specifically each and every other allegation contained in said paragraph.

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint and that this defendant have its costs of suit.

SAMUEL W. McNABB,
United States Attorney,

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney,

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

Alva C. Baird
ALVA C. BAIRD,
Special Attorney,
Bureau of Internal Revenue,

Richard W. Wilson,
RICHARD W. WILSON,
Special Attorney,
Bureau of Internal Revenue.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

REX B. GOODCELL, being first duly sworn, deposes and says: That he is the defendant named in the within entitled action and is the identical person designated in the title thereof as former Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

Rex B. Goodcell.

Rex B. Goodcell.

Subscribed and sworn to before me this 30th day of December, 1930.

[Seal] J. M. Kugler,
Notary Public.

[Endorsed]: Filed Dec. 30, 1930 R. S. Zimmerman, Clerk, By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION WAIVING JURY

IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

DATED: This 27 day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON
By Joseph D. Peeler
Attorneys for Plaintiff.

Samuel W. McNabb,
SAMUEL W. McNABB,
United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney

Richard W. Wilson
RICHARD W. WILSON,
Special Attorney for the Bureau of Internal Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AND ORDER CONSOLIDATING CASES FOR TRIAL.

It is hereby stipulated by and between the plaintiff and defendant above named, through their respective attorneys, that the above-entitled cause may be consolidated for trial with the case of The St. Helens Petroleum Company, Ltd. v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, case #4252-C, which is set for trial on April 28, 1931.

This stipulation is entered into for the reason that the above cases are so similar in fact and law that it would be a waste of time for the court and the parties concerned to try the cases separately.

Feb. 24, 1931

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

Samuel W. McNabb.
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

Richard W. Wilson.
Special Attorney,
Bureau of Internal Revenue.
Attorneys for Defendant.

ORDER

Upon reading the above stipulation and good cause appearing therefor, the court hereby transfers the above-entitled cause to the trial calendar and department of the Honorable Judge Cosgrave.

Wm. P. James

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

CONSENT

Upon reading the above stipulation and the order of the Honorable Judge James appearing above, I hereby consent to and accept the transfer of the above cause to my department.

Geo. Cosgrave

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

ORDER

Upon reading the above stipulation and the above order and consent transferring the above-entitled cause to the Honorable Judge Cosgrave's department, the court hereby consents and orders that the above cases be consolidated for trial before the Honorable Judge Cosgrave on the 28th day of April, 1931.

Geo. Cosgrave,

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

[Endorsed]: Filed Feb. 25, 1931 R. S. Zimmerman, Clerk. By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oilfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, its original and amended corporation income tax returns for the fiscal year ended May 31, 1924, on, to-wit, August 11, 1924, October 14, 1924, and April 6, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, the taxes shown on said returns in the following amounts and on the following dates:

August 11, 1924	$ 4,500.00
October 14, 1924	85.07
November 17, 1924	4,585.07
February 10, 1925	4,585.08
May 8, 1925	4,585.07
Total –	$18,340.29

IV.

That on April 17, 1928, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid for the fiscal year ended May 31, 1924, in the manner and form provided by law, covering the issues raised in the complaint herein.

V.

That on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by the plaintiff

in the amount of $1367.92, by crediting said amount to taxes due on the fiscal year return for 1918. On March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $2386.79, rejecting the claim for refund to the extent of $14,585.58.

VI.

That during the fiscal year ended May 31, 1924, plaintiff accrued and paid to the government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,-540.00 in United States currency. The net income of plaintiff from sources within the United States during the fiscal year ended May 31, 1924, was 76.61 per centum of the total net income of plaintiff from all sources during that year. The amount of the British income tax allocable to United States income was $52,507.73. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73 on account of said British income taxes.

VII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1924.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plain-

tiff deductions on its income tax return for the fiscal year ended May 31, 1924, in the amount of $52,507.73, for the income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deduction.

The Court determines that the defendant Rex B. Goodcell erroneously and illegally collected from plaintiff the sum of $6563.47, and that plaintiff is entitled to recover from defendant the sum of $6563.47, together with interest at the rate of 6 per cent on $830.36 from May 8, 1925; on $4585.08 from February 10, 1925, and on $1148.03 from November 17, 1924, as provided by law.

That plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

Approved as to form according to Rule 44

Eugene Harpole
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 8, 1933 R. S Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 4257-J.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant.	)	

JUDGMENT ON FINDINGS

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, it attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States

Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of plaintiff in accordance with said findings;

NOW, THEREFORE, by virtue of the law, and by reason of the findings aforesaid, it is considered by the Court that the plaintiff have judgment in the amount of $6563.47, together with interest at the rate of 6 per cent on $830.36 from May 8, 1925; on $4585.08 from February 10, 1925, and on $1148.03 from November 17, 1924, as provided by law, with costs taxed at $20.00.

Judgment rendered this Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

CERTIFICATE OF PROBABLE CAUSE

The Court certifies that the defendant, Rex B. Goodcell, as Collector of Internal Revenue, exacted and received payment of the monies recovered herein in the performance of his official duty, and that there was probable cause for the act done by the defendant, and that he was acting under the directions of the Secretary of the Treasury, or other proper officer of the Government.

Geo. Cosgrave
United States District Judge.

Approved as to form as required by Rule 44.

Peirson M. Hall
Peirson M. Hall, E. H.
United States Attorney.

Ignatius F. Parker
Ignatius F. Parker, E. H
Assistant United States Attorney

Alva C. Baird
Alva C. Baird, E. H.
Assistant United States Attorney

ATTORNEYS FOR DEFENDANT

Joseph D. Peeler,
Joseph D. Peeler,
ATTORNEY FOR PLAINTIFF

JUDGMENT ENTERED NOVEMBER 8th, 1933

R. S. ZIMMERMAN, Clerk. By Francis E. Cross, Deputy Clerk

[Endorsed]: Filed Nov. 8, 1933. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
Plaintiff and Appellee,	)	
vs.	)	
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	At Law No. 4257-J
Defendant and Appellant.	)	

BILL OF EXCEPTIONS

Be it remembered that heretofore to-wit, on the 28th day of April, 1931, the above-entitled cause came on regularly for trial at Los Angeles, California, upon the issues joined herein before his Honor, George Cosgrave sitting as Judge of the above-entitled Court, without a jury, a jury having been duly waived by the parties by written Stipulation as follows:

"IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

"Dated: This 8th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON

BY JOSEPH D. PEELER,
Joseph D. Peeler
Attorneys for Plaintiff.

Samuel W. McNabb,
Samuel W. McNabb,
United States Attorney,

Ignatius F. Parker,
Ignatius F. Parker,
Assistant U. S. Attorney,

Attorneys for Defendant".

Plaintiff appeared by Messrs. Chevalier, Peeler & Wilson, and the defendant appeared by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker and Louis *Summers,* Assistant United States Attorneys for said District, and Richard W. Wilson, Special Attorney, Bureau of Internal Revenue, and the parties introduced in evidence a Stipulation as to certain facts which had been agreed upon by both parties, which Stipulation (omitting the Exhibits therein referred to) is as follows:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	:	
-v-	:	No. 4257-J.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	:	

STIPULATION OF FACTS.

It is hereby stipulated and agreed by the parties, plaintiff and defendant, in this action, by their respective counsel, that the following statements of fact are true and correct, and shall be accepted and used as agreed evidence in this case, provided, however, that nothing herein shall prevent either party from introducing other and further evidence, not inconsistent herewith.

I.

That the plaintiff, The Kern River Oilfields of California, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its prinicpal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, its original and amended corporation income tax returns for the fiscal year ended May 31, 1924, on, to-wit, August 11, 1924, October 14, 1924, and April 6, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, the taxes shown on said returns in the following amounts and on the following dates:

August 11, 1924	$4,500.00
October 14, 1924	85.07
November 17, 1924	4,585.07
February 10, 1925	4,585.08
May 8, 1925	4,585.07
Total	$18,340.29

IV.

That on April 17, 1928, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of income taxes paid for the fiscal year ended May 31, 1924, in the manner and form shown by photostatic copy herewith, marked Exhibit No. 6.

V.

That by Certificate of Overassessment #953814, Schedule #27,861, on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by the plaintiff in the amount of $1,367.92, by crediting said amount to taxes due on the fiscal year return for 1918.

VI.

That by Certificate of Overassessment #2,047,605, Schedule #33,589, dated March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $2,386.79, reducing the tax liability to $14,585.58. Said certificate of overassessment notified plaintiff of the rejection of its claim for refund to the extent of $14,585.58 as of March 5, 1929.

VII.

That during the fiscal year ended May 31, 1924, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,-540.00 in United States currency. That the net income of plaintiff from sources within the United States during the fiscal year ended May 31, 1924, was 76.61 per centum of the total net income of plaintiff from all sources during that year. Plaintiff contends, and defendant denies, that plaintiff is entitled to a deduction, in determining its taxable net income, of the income taxes so accrued and paid to the Government of Great Britain; but it is agreed that if said taxes are deductible, the amount of said deduction for the fiscal year ended May 31, 1924 is $52,507.73. It is also stipulated that the plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73, on account of said British income taxes.

VIII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes

for the fiscal year ended May 31, 1924, and that except as set forth above in paragraphs V and VI, no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for the fiscal year ended May 31. 1924.

Joseph D. Peeler.
Miller, Chevalier, Peeler & Wilson,
Counsel for Plaintiff.

Samuel W. McNabb.
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

Richard W. Wilson.
Richard W. Wilson,
Special Attorney,
Bureau of Internal Revenue.

Approved:

.....
United State District Judge.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

Thereupon the respective parties having rested, plaintiff by its counsel, moved for judgment on the record and asked for special findings of Fact, and the defendant, by his counsel, moved for judgment for the defendant on the oral and documentary evidence introduced. The Court reserved its ruling on said motions until the final decision of the case.

Counsel for the respective parties thereupon entered into the following Stipulation in open Court:

"MR. PEELER: There is just one thing I overlooked, and should have stated. This involves British cases and British law, and by agreement, we have not attempted to put into evidence the British law or the British cases. I don't know whether the court will take judicial notice of them automatically or not, but we would like to stipulate that the court may take judicial notice of the British law incorporated in the briefs of counsel.

"MR. WILSON: That is agreeable to the Government, your Honor.

"THE COURT: Very well."

Pursuant to said Stipulation made in open Court, the plaintiff in its opening Brief cited the following British cases and British law:

Act of 1842, Section 54.

British Income Tax 1918, Schedule D, Par. 359.

British Income Tax 1918, Schedule D, Par. 394.

General Rules, Paragraph 320.

General Rules, Paragraph 439.

Law of Income Tax, E. M. Konstam, K. C., 1923.

Bradbury v. English Sewing Cotton Company, Ltd., (1922) 2 K B. 589.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Gold Fields American Development Company, Ltd., v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times 14 (1926).

Rex v. Purdie (1914) 3 K. B. 112, 111 Times Law Reports 531.

Sheldrick v. South African Breweries, Ltd. (1923) 1 K. B. 173, at 191.

Defendant cited British cases and British law as follows in his Brief:

Ashton Gas Company v. Attorney General (1906) 75 L. J. Ch. 1, 93 L. T. 676.

Bart, Sir Marcus Samuel, v. The Commissioner of Inland Revenue, 34 T. L. R. 552 (Vol. 7, Great Britain Tax Cases, p. 27)

Brooke v. Commissioners of Inland Revenue (7 T. C. 261) (1918) 1 K. B. p. 257.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Mylam (Surveyor of Taxes) v. The Market Harborough Advertiser Company, Ltd., 21 T. L. R. 201, Great Britain Tax Cases, Vol. 5, p. 95.

Scottish Union and National Insurance Company v. New Zealand and Australian Land Company (1921), 1 App. Cas. 172.

Sheldrick v. South African Breweries, Ltd. (1923), 1 K. B. 173.

"Income Tax", F. G. Underhay.

"The Law of Income Tax", Second Edition, E. M. Konstam, K. C.

Report of Commissioner of Inland Revenue for the fiscal year ended March 31, 1922.

"Taxation of Business in Great Britain", Department of Commerce, Trade Promotion Series, No. 60 p. 65.

Great Britain:

Income Tax Act 1918 and Finance Acts 1919 to 1925, Inc.

Schedule D, paragraph 359.

Schedule D, paragraph 394.

Section 237, Act of 1918.

General Rules, paragraph 420.

General Rules, paragraph 439.

General Rules, paragraph 442.

In its Reply Brief, plaintiff cited British law and British cases as follows:

Konstam, Income Tax, pp. 19 and 20.

Ashton Gas Company v. Attorney General, 75 L. J. Ch. 1.

Bradbury v. English Sewing Cotton Co., Ltd. 2 K. B. 589.

Commissioners v. Blott, 2 A. C. 171.

Gold Fields American Development Company, Ltd. v. Consolidated Gold Fields of South Africa. Ltd., 135 The Law Times, 14.

Ritson v. Phillips, 131 L. T. 384; 9 Tax Cas. 10.

Briefs were filed and the cause submitted for decision. Thereafter and on the 21st day of September, 1933, the Court made the following Minute Order:

At a stated term, to wit: The SEPTEMBER Term, A. D. 1933, of the District Court of the United States of America, within and for the CENTRAL Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES on THURSDAY the 21st day of SEPTEMBER in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable GEO COSGRAVE District Judge.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	Nos. 4252 4255
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue.	Nos. 4258-H 4045-H (Dismissed)
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue, Defendant.	Nos. 4253-M 4256-M 4257-J Law
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4254-J Law

These consolidated causes having under date of April 28, 1931 come before the Court for hearing, and having been ordered submitted on Stipulation of Facts filed and briefs to be filed, and briefs having been filed, and the Court having duly considered the matter, it is now by the Court ordered:

"The question presented in this case is whether, in computing its net taxable income, a foreign corporation is entitled to deduct income taxes paid a foreign country when such taxes so paid were, as permitted by the laws of the foreign country, deducted from dividends paid to its stockholders. The Revenue Act applicable to the years involved in clear language allows such deduction, but the government maintains that since the corporation is empowered to deduct from the dividends payable to its stockholders the amount of such tax, it does not come within the meaning of the Revenue Act.

"I think the position of the government is not well-founded. The foreign corporation in the express language of the Revenue Act is entitled to a deduction of such payments and I regard as entirely incidental the circumstance that under the laws of the foreign country the corporation is entitled to credit to the tax so paid when it comes to paying dividends to its shareholders. The interpretation sought by the government would change a ~~statute~~ / provision of a statute in which there is no ambiguity whatever. This may not be done. (Gould v. Gould, 245 U. S. 151).

"Judgment is therefore ordered in favor of the plaintiffs with exception to defendant."

On the 8th day of November, 1933, defendant filed and presented the following Request for Findings of Fact and Conclusions of Law to the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	NO.4257-J.
REX B. GOODCELL, Former Collector of Internal Revenue,	)	
Defendant.	)	

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the Defendant above-named, by and through his attorney Peirson M. Hall, United States Attorney for the Southern District of California, Ignatius F. Parker and Alva C. Baird, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and hereby requests the Court that in rendering and making its judg-

ment in the above-entitled cause, which has been submitted to the Court, said Court make specific findings of fact and conclusions of law upon the issues included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

Peirson M. Hall
PEIRSON M. HALL, E. H.
United States Attorney,

Alva C. Baird
ALVA C. BAIRD, E. H.
Assistant U. S. Attorney,

Eugene Harpole.
EUGENE HARPOLE,
Special Attroney,
Bureau of Internal Revenue,

Attorneys for Defendant

Presented and rejected.

Geo. Cosgrove,
Judge.

FINDINGS OF FACT.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

CONCLUSIONS OF LAW

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

II.

That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause.

Dated: This.....day of....., 1933.

.....

UNITED STATES DISTRICT JUDGE.

Approved as to form as
provided by Rule 44:

.....

.....

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 8, 1933 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

And plaintiff presented the following Findings of Fact and Conclusions of Law to the Court on the said 8th day of November, 1933:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD,, a Corporation, Plaintiff,	)	
vs.	)	No. 4257-J.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	)	

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received

and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

The Court finds that the plaintiff, The Kern River Oildfields of California, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, its original and amended corporation income tax returns for the fiscal year ended May 31, 1924, on, to-wit, August 11, 1924, October 14, 1924, and April 6, 1926.

III.

That the plaintiff paid to Rex B. Goodcell, as Collector of Internal Revenue, the taxes shown on said returns in the following amounts and on the following dates:

August 11, 1924	$ 4,500.00
October 14, 1924	85.07
November 17, 1924	4,585.07
February 10, 1925	4,585.08
May 8, 1925	4,585.07
Total –	$18,340.29

IV.

That on April 17, 1928, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid for the fiscal year ended May 31, 1924, in the manner and form provided by law, covering the issues raised in the complaint herein.

V.

That on or about January 1, 1928, the Commissioner of Internal Revenue reduced the taxes paid by the plaintiff in the amount of $1367.92, by crediting said amount to taxes due on the fiscal year return for 1918. On March 5, 1929, the Commissioner of Internal Revenue allowed a refund of $2386.79, rejecting the claim for refund to the extent of $14,585.58.

VI.

That during the fiscal year ended May 31, 1924, plaintiff accrued and paid to the government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,-540.00 in United States currency. The net income of plaintiff from sources within the United States during the fiscal year ended May 31, 1924, was 76.61 per centum of the total net income of plaintiff from all sources during that year. The amount of the British income tax allocable to United States income was $52,507.73. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73 on account of said British income taxes.

VII.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1924.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 31, 1924, in the amount of $52,507.73, for the

income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deduction.

The Court determines that the defendant Rex. B. Goodcell erroneously and illegally collected from plaintiff the sum of $6563.47, and that plaintiff is entitled to recover from defendant the sum of $6563.47, together with interest at the rate of 6 per cent on $830.36 from May 8, 1825; on $4585.08 from February 10, 1925, and on $1148.03 from November 17, 1924, as provided by law.

That plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: Nov. 8, 1933.

Geo. Cosgrave
United States District Judge.

Approved as to form according to Rule 44
EUGENE HARPOLE
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov 8, 1933. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

Whereupon the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the Plaintiff, and adopted, made and entered the same as its Findings of Fact and Conclusions of Law herein and rejected the Findings of Fact and Conclusions of Law requested by the defendant to which the defendant noted an exception and on the 24th day of November, 1933, the following Order was duly made and entered by the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	)	No. 4257-J.
vs.	)	ORDER ALLOWING EXCEPTIONS
REX B. GOODCELL, former Collector of Internal Revenue, Defendant.	)	

IT IS ORDERED that exception in favor of the defendant, to the Court's action in adopting and entering the Conclusions of Law and Judgment presented by the plaintiff and in refusing to adopt the Findings of Fact and Conclusions of Law presented by the defendant, be entered on the minutes of the court as of the 8th day of November, 1933, by the Clerk, nunc pro tunc.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE

Approved as to form under
Rule 44 and no objection
offered to entry of the Order.

Joseph D. Peeler,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 24, 1933 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Plaintiff, Appellee, and Defendant, Appellant, that the foregoing Bill of Exceptions contains all evidence given and proceedings had in the trial of this action material to the Appeal of defendant, and that it may be approved, allowed and settled by the Judge in the above-entitled Court as correct in all respects; that the same shall be made a part of the record in said case and be the Bill of Exceptions therein and that said Bill of Exceptions may be used by either plaintiff or defendant upon any Appeal taken by plaintiff or defendant, and that said Bill may be certified and signed by the Judge upon presentation of this Stipulation without further notice to either party hereto or to their respective counsel.

Dated: This 26th day of April, 1934.

MILLER, CHEVALIER, PEELER & WILSON,

BY Joseph D. Peeler

Attorneys for Plaintiff and Appellee.

Peirson M. Hall D

PEIRSON M. HALL,

United States Attorney,

Robert W. Daniels
ROBERT W. DANIELS,
Asst. U. S. Attorney,

Alva C. Baird - E. H.
ALVA C. BAIRD,
Assistant U. S. Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS

The *following* Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties plaintiff or defendant upon any appeal taken by either party plaintiff or defendant.

Dated: This 27th day of April, 1934.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS.

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor.

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including the 8th day of February, 1934.

Dated: November 15, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Nov. 15, 1933. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TERM
and *term.*

Upon motion of the Defendant, and good cause appearing therefor,

IT IS ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Time and the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including May 8, 1934, and the time therefor is extended accordingly.

DATED: FEBRUARY 7, 1934.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Feb 7 – 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL FROM JUDGMENT ENTERED NOVEMBER 8, 1933.

TO THE ABOVE ENTITLED COURT AND TO HONORABLE GEORGE COSGRAVE, JUDGE THEREOF:

Your petitioner, the defendant in the above-entitled case, feeling aggrieved by the judgment as entered *here* herein in favor of said plaintiff on November 8, 1934, prays that this Appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided, and in connection with this petition petitioner hereby presents Assignment of Errors dated February 8th, 1934.

Peirson M. Mall
PEIRSON M. HALL, E. H.
United States Attorney,

Alva C. Baird
ALVA C. BAIRD, E.H.
Assistant U. S. Attorney,

Eugene Harpole
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Feb 8 – 1934 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a Corporation, Plaintiff,	)	
vs.	)	NO. 4257-J.
	)	ASSIGNMENT
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	)	OF ERRORS.

The Defendant and appellant above-named makes and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal from the judgment of this Court entered therein on the 8th day of November, 1933:

I.

That the Court erred in rendering judgment against the defendant and in favor of the plaintiff in the amount of $6,563.47, together with interest at the rate of six

(6%) per cent on $830.36 from May 8, 1925; on $4,585.08 from February 10, 1925, and on $1,148.03 from November 17, 1924, with costs taxed at $20.00, in that the evidence introduced herein and the facts found therefrom by the Court and the record in this cause are insufficient to support a judgment in favor of the plaintiff in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the Court and the record disclose that plaintiff is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1924, accrued and paid to the Government of Great Britain an income tax equivalent to $68,540.00 in United States currency; and that the plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73, on account of said British income taxes.

II.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff herein for the reason that said judgment is not supported by the facts found by the Court herein for the reason that the Court found as a fact that during the fiscal year ended May 31, 1924, plaintiff accrued and paid to the Government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,540.00 in United States currency. The income of plaintiff from sources within the United States during

the fiscal year ended May 31, 1924, was 76.61 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to the United States income was $52,507.73. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $52,507.73 on account of said British income taxes.

III.

The Court erred in refusing to adopt the Defendant's Proposed Finding of Fact Number I, which reads as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

IV.

The Court erred in refusing to adopt the Defendant's Proposed Conclusions of Law numbered I and II, which read as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to suppport a Judgment in its favor in the above-entitled action".

"II.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause",

for the reason that the evidence introduced and the facts found by the Court in this action require the adoption of said Conclusions of Law.

V.

The Court erred in concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to allow the plaintiff a deduction on its income tax return for the fiscal year ended May 31, 1924 in the amount of $52,507.73 for income taxes accrued and paid to the Government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom by the Court disclose that the amount of $52,507.73 so accrued and paid to the Government of Great Britain for income taxes by plaintiff was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1924.

VI.

The Court erred in failing to find and conclude as a matter of law herein that no part of the amount of $52,-

507.73, accrued and paid by the plaintiff to the Government of Great Britain as an income tax during the fiscal year ended May 31, 1924, and deducted by plaintiff from dividends paid by it to its stockholders during said fiscal year, was deductible from plaintiff's gross income for said year in computing the correct income tax due from it to the Government of the United States.

VII.

The Court erred as a matter of law in not rendering judgment against the plaintiff and in favor of the defendant for his costs and disbursements expended herein.

Dated: This 8th day of February, 1934.

Peirson M. Hall,
PEIRSON M. HALL, E. H.
United States Attorney,

Alva C. Baird
ALVA C. BAIRD. E. H.
Assistant U. S. Attorney,

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 8 - 1934 R. S. Zimmerman, Clerk, By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

In the above-entitled action, the defendant having filed its petition for an order allowing it to appeal from the judgment entered in the above-entitled action on November 8, 1933;

IT IS ORDERED, that said appeal, from said judgment, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed to the defendant, and that a certified transcript of the record, bill of exceptions, exhibits, stipulations and pleadings and all proceedings herein be transmitted to said United States Circuit Court of Appeals.

Dated: This 8th day of February, 1934.

Geo. Cosgrave,
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Feb 8 – 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

SECOND AMENDED PRAECIPE.

TO: R. S. Zimmerman, Clerk of the United States District Court, Southern District of California:

YOU ARE HEREBY REQUESTED to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. Stipulation Waiving Jury.
5. Stipulation and Order Consolidating Cases for Trial.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated November 15, 1933.
9. Order Extending Term and Time to File Bill of Exceptions, dated February 7, 1934.
10. Petition for Appeal.
11. Assignments of Error on Appeal.
12. Order Allowing Appeal.

13. Bill of Exceptions.

    (a) Stipulation Waiving Jury.

    (b) Stipulation of Facts with Exhibits omitted.

    (c) Stipulation of Counsel in open Court and citations of British Law and Cases.

    (d) Minute Order dated September 21, 1933.

    (e) Defendant's Request for Findings of Fact and Conclusions of Law.

    (f) Plaintiff's Proposed Findings of Fact and Conclusions of Law.

    (g) Order Allowing Exceptions Nunc Pro Tunc.

14. Clerk's Certificate and this Second Amended Praecipe.

Dated: This 26th day of April, 1934.

Peirson M. Hall D.
PEIRSON M. HALL,
United States Attorney.

Robert W. Daniels,
ROBERT W. DANIELS,
Assistant United States Attorney.

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant United States Attorney.

Eugene Harpole
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,

Attorneys for Defendant and Appellant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Appellant and Appellee that the foregoing Second Amended Praecipe may be filed, shall be used in lieu of and replace all Praecipes heretofore filed for the purpose of the preparation of the record upon Appeal in the above-entitled action; that in preparing the record herein, the Clerk of the United States District Court may omit all endorsements, except the endorsements of the filing date, from the papers requested in the foregoing Second Amended Praecipe.

MILLER, CHEVALIER, PEELER & WILSON,
By Joseph D. Peeler,
Attorneys for Plaintiff and Appellee.

Peirson M. Hall, D.
PEIRSON M. HALL,
United States Attorney,

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney.

Alva C. Baird E.H.
ALVA C. BAIRD,
Assistant United States Attorney.

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr. 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 57 pages, numbered from 1 to 57 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; stipulation waiving jury; stipulation and order consolidating cases for trial; special findings of fact and conclusions of law; judgment; bill of exceptions; order extending time within which to serve and file bill of exceptions; order extending term and time to file bill of exceptions; petition for appeal assignment of errors; order allowing appeal, and second amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7492

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

v.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,

Appellee.

On Appeal From the District Court of the United States, for the Southern District of California,

BRIEF FOR THE APPELLANT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.
Counsel for Appellant.

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1377

SUBJECT INDEX

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

v.

THE KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation,
Appellee.

BRIEF FOR THE APPELLANT

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California (R. 34-35), which is unreported.

Jurisdiction

This appeal involves income taxes of The Kern River Oilfields of California, Ltd., a corporation, for the fiscal year ended May 31, 1924 (R. 27-28), and is taken from a judgment of the District Court in favor of the taxpayer entered November 8, 1933 (R. 22-23). The appeal is brought to this Court by petition for appeal on behalf of the Collector of Internal Revenue filed February 8,

1934 (R. 48), pursuant to Section 128 (a) of the *Judicial Code*, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a British corporation, doing business in the United States, is entitled to deduct from gross income, income taxes paid to Great Britain when such income taxes were deducted from dividends paid to its stockholders?

2. Whether the judgment is supported by the findings?

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved will be found in Appendices A and B in appellant's brief in the case of *Galen H. Welch, Collector, v. The St. Helens Petroleum Company, Ltd., a corporation*, No. 7488, now pending before this Court.

Statement

The facts were stipulated. (R. 27-30.) The appellee is a corporation organized under the laws of Great Britain, having an office and place of business at Los Angeles, California (R. 27), whose income from sources within the United States during the fiscal year ended May 31, 1924, was 76.61 per centum of its total income from all sources during that year (R. 29).

During the fiscal year ended May 31, 1924, appellee accrued and paid to the government of Great Britain an income tax amounting to £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,540 in United States currency, of which appellee deducted from divi-

dends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73 on account of said British income taxes. (R. 29.)

In its income tax returns for the fiscal year ended May 31, 1924, appellee reported a tax due therein of $18,340.99, which was duly assessed and paid to the appellant, then Collector of Internal Revenue for the Sixth Collection District of California. (R. 28.)

On or about April 17, 1928, appellee filed with the Commissioner of Internal Revenue a claim for refund of $18,340.29, being the whole of the tax paid for the fiscal year ended May 31, 1924, claiming that it should have taken deductions in its return, in full for London overhead expenses in proportion to gross income from the United States; for depletion based on cost instead of valuation as of March 1, 1913; and for British income taxes deducted from dividends paid to its stockholders. (R. 6-7.) The Commissioner allowed appellee's claim for refund to the extent of $3,754.71, and rejected it to the extent of $14,585.58. (R. 28-29.) No other deductions were claimed by appellee in its claim for refund (Ex. 6), or in the complaint (R. 4-10). The Commissioner has allowed no deduction on account of said British income tax for the fiscal year ended May 31, 1924. (R. 29-30.) Appellee contended, and appellant denied, that appellee was entitled to such deduction, but it was agreed that if said British income taxes were deductible, the amount of such deduction for the fiscal year ended May 31, 1924, was $52,507.73. (R. 29.) This amount was allowed as a deduction by the court. (R. 20-21, 41-42.)

Upon the basis of the disallowance by the Commissioner of appellee's claim for refund to the extent of $14,585.58 (R. 28-29), this suit was commenced on November 6, 1930, for the recovery of $6,563.47 (R. 4-10).

By stipulation a jury was waived, and the case was tried to the court without the intervention of a jury. (R. 26.) At the close of all the evidence counsel for appellant moved for judgment in favor of the appellant (R. 31), and on September 21, 1923, the court, by minute entry, ordered judgment in favor of the appellee (R. 34-35). The appellant filed requests for special findings of fact and conclusions of law (R. 36-38), which were denied by the court (R. 42). The findings adopted by the court (R. 18-21), were those requested by the appellee (R. 38-42).

The court held that the appellee was entitled to a deduction of $52,507.73 on account of dividends paid to the government of Great Britain and deducted from dividends to its stockholders (R. 20-21), and on this basis rendered judgment for the appellee for $6,563.47 (R. 22-23). From this judgment for appellee the appellant has appealed. (R. 48.)

Specification of Errors to be Urged

The court erred (R. 49-53):

1. In rendering judgment against the appellant and in favor of the appellee in the amount of $6,563.47, together with interest at the rate of six (6%) per cent on $830.36 from May 8, 1925; on $4,585.08 from February 10, 1925, and on $1,148.03 from November 17, 1924,

with costs taxed at $20, in that the evidence introduced herein and the facts found therefrom by the court and the record in this cause are insufficient to support a judgment in favor of the appellee in said amount, or in any other sum or at all, for the reason that said evidence and the facts established and found by the court and the record disclose that appellee is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1924, accrued and paid to the government of Great Britain an income tax equivalent to $68,540 in United States currency; and that the appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73, on account of said British income taxes.

2. In rendering judgment against the appellant and in favor of the appellee herein for the reason that said judgment is not supported by the facts found by the court herein for the reason that the court found as a fact that during the fiscal year ended May 31, 1924, appellee accrued and paid to the government of Great Britain an income tax in the amount of £15,571-12-6 Sterling, which, at the rate of $4.40, was the equivalent of $68,540 in United States currency. The income of appellee from sources within the United States during the fiscal year ended May 31, 1924, was 76.61 per centum of the total net income of appellee from all sources during said year. The amount of the British income tax allocable to the United States income was $52,507.73. Appellee deducted from dividends paid by it to its stockholders during said fiscal year, an amount of at least $52,507.73 on account of said British income taxes.

3. In refusing to adopt the appellant's Proposed Finding of Fact Number I, which reads as follows (R. 51):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

4. In refusing to adopt the appellant's Proposed Conclusions of Law numbered I and II, which read as follows (R. 51-52):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.
>
> "That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause,"

for the reason that the evidence introduced and the facts found by the court in this action require the adoption of said Conclusions of Law.

5. In concluding, as a matter of law, that the Commissioner of Internal Revenue erred in failing and refusing to allow the appellee a deduction on its income tax return for the fiscal year ended May 31, 1924, in the amount of $52,507.73 for income taxes accrued and paid to the government of Great Britain, and in levying tax assessments upon the basis of net income computed without the allowance of said deductions for the reason that the evidence introduced and the facts found therefrom

by the court disclose that the amount of $52,507.73 so accrued and paid to the Government of Great Britain for income taxes by appellee was by it deducted from dividends paid by it to its stockholders during said fiscal year ending May 31, 1924.

6. In failing to find and conclude as a matter of law herein that no part of the amount of $52,507.73, accrued and paid by the appellee to the Government of Great Britain as an income tax during the fiscal year ended May 31, 1924, and deducted by appellee from dividends paid by it to its stockholders during said fiscal year, was deductible from appellee's gross income for said year in computing the correct income tax due from it to the Government of the United States.

7. As a matter of law in not rendering judgment against the appellee and in favor of the appellant for his costs and disbursements expended herein.

Argument

This appeal involves the identical questions that are presented in the third argument in the brief for the appellant in the case of *Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California v. The St. Helens Petroleum Company, Ltd., a corporation*, No. 7488, now pending before this Court. The appellant's position is fully presented in the brief for the appellant filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellant's brief in *The St. Helens Petroleum Co., Ltd.*, case, No. 7488, are served herewith upon counsel for the appellee.

Conclusion

For the reasons stated in the appellant's brief in *The St. Helens Petroleum Co., Ltd.,* case, No. 7488, it is urged that the decision of the court below in holding that amount accrued and paid by the appellee to the government of Great Britain as an income tax and deducted by appellee from dividends paid by it to its stockholders during the fiscal year was deductible from appellee's gross income for that year, was erroneous, and should be reversed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.

January, 1935.

No. 7492.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

14

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,
Appellee.

BRIEF FOR THE APPELLEE.

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF STATUTES CITED.

No. 7492.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

The Kern River Oilfields of California, Ltd., a corporation,
Appellee.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the court below, the District Court of the United States for the Southern District of California, which is unreported, is set forth on pages 34-35 of the Transcript of Record.

JURISDICTION.

This appeal involves income and profits taxes for the fiscal year ended May 31, 1924, and is taken from a judgment of the District Court entered in favor of the taxpayer on November 8, 1933. [R. 22-23, 28.] The appeal is brought to this Court by petition for appeal filed by appellant on February 8, 1934 [R. 48], pursuant to Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

During the taxable year ended May 31, 1924, the appellee paid to Great Britain certain income taxes upon its profits and subsequently deducted a corresponding amount from dividends paid by it to its stockholders during said year. Were such taxes deductible from its gross income for said taxable year? The fundamental question is whether said taxes were imposed by Great Britain upon the corporation's income or upon the dividends paid to its stockholders.

STATUTES INVOLVED.

The applicable provisions of the Federal and British statutes will be found in the appendix attached to the brief filed in Docket No. 7488.

STATEMENT OF FACTS.

All the facts were stipulated. [R. 27-30.] The appellee is a corporation organized under the laws of Great Britain having its principal office and place of business in Los Angeles, California. [R. 27.] During the fiscal year ended May 31, 1924, it accrued and paid to the Government of Great Britain an income tax in amount, converted into United States currency, of $68,540.00. [R. 29.] During the same fiscal year its income from sources within the United States was 76.61 per cent of its total net income from all sources. [R. 29.] Appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $52,507.73, on account of said British taxes. [R. 29.] The parties hereto stipulated and agreed that if the plaintiff is entitled to a deduction, in determining its taxable net income, of income taxes so accrued and paid to Great Britain, the amount of said deduction for the fiscal year ended May 31, 1924, is $52,-507.73. [R. 29.] The Commissioner of Internal Revenue allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1924. [R. 29-30.]

In its tax returns for the fiscal year ended May 31, 1924, appellee reported total taxes in the amount of $18,-340.29, which was duly assessed and paid to appellant as Collector of Internal Revenue. [R. 28.]

Within the period and in the manner provided by law, appellee filed with the Commissioner of Internal Revenue a claim for refund, setting forth therein the same grounds alleged in its Complaint in the present proceeding. [R. 6-10, 12, 28, 40.] The Commissioner of Internal Revenue rejected said claim for refund and appellee filed its complaint in the present proceeding. [R. 4-10, 28-29, 41.]

By stipulation a jury was waived and the case was tried by the Court without the intervention of a jury [R. 26.] The parties filed with the Court a stipulation of facts, in which they stipulated the facts, as set forth above, relative to the British income taxes, and left for determination by the Court the question of deductibility [R. 29.]. At the close of all the evidence, counsel for each party moved for judgment on the record. [R. 31.] On September 21, 1933, the Court, by minute order, ordered judgment in favor of appellee. [R. 34-35.] Appellant filed requests for special findings of fact and conclusions of law, which were rejected by the Court. [R. 36-38, 42.] The Court accepted and adopted the findings and conclusions of law requested by appellee [R. 18-21, 38-42]. The Court determined that the Commissioner had erred in refusing to allow to appellee a deduction from income for the fiscal year ended May 31, 1924, in the amount of $52,507.73 for British income taxes, and in levying tax assessments on the basis of net income computed without the allowance of said deductions. [R. 41-42.] On this basis, the Court rendered judgment for the appellee for $6,563.47, with interest as provided by law. [R. 22-23.] From this judgment for appellee, the appellant has appealed. [R. 48.]

PRELIMINARY STATEMENT.

At the trial below, six associated cases were consolidated for trial, all being suits against present or former collectors of internal revenue for income or income and profits taxes alleged to have been erroneously collected. In each of these cases, judgment was entered by the Court in favor of the taxpayer, and all, upon appeal, have been set for argument together before this Court. Following is a list of these cases, showing the Docket No. in this Court, the names of the parties, and the fiscal year involved.

Docket No.	Taxpayer (Appellee)	Collector (Appellant)	Fiscal Year Ended May 31
7488	The St. Helens Petroleum Co., Ltd.	Galen H. Welch	1921
7490	" " " " "	" "	1922
7493	" " " " "	Rex B. Goodcell	1922
7491	The Kern River Oilfields of Cal., Ltd.	" " "	1923
7492	" " " " "	" " "	1924
7489	" " " " "	" " "	1925

Dockets 7490 and 7493 involved the same taxpayer, the same taxable year, and the same issues, with separate suits being brought and separate judgments being rendered against two successive collectors of internal revenue because a part of the tax in controversy was paid to each of them.

The issue involving the deductibility of British income taxes is involved in *all* of these cases and was the only issue presented by the parties at the trial below, the other issues raised by the pleadings having been conceded by appellants in the stipulations filed at the trial. [R. 35.]

The other issue, involved only in Docket Nos. 7488, 7490, and 7493, is the jurisdiction of the trial court to enter judgment in any case where the profits taxes have

been determined under Section 328, Revenue Acts of 1918 and 1921. As Congress did not impose any profits tax for any period after December 31, 1921, this issue naturally is not presented in Docket Nos. 7489, 7491 and 7492.

Appellants have presented their full arguments on both issues in the brief filed in Docket No. 7488, and have merely referred to said brief in the briefs presented in all other cases. As a matter of convenience and to avoid confusion, the same procedure is being followed by appellees. Accordingly the full statement of argument on both issues will be presented in the brief filed under Docket No. 7488.

SUMMARY OF ARGUMENT.

Under the Federal Revenue Acts of 1918 and 1921, the deduction for taxes (including income taxes paid to a foreign Government) is allowable to the one on whom the taxes were imposed and by whom they were paid. It has been stipulated and found by the Court that the British income tax of $52,507.73, in issue here, was paid to the British Government by the appellee. [R. 29.] It is clear that, under British law, this tax was imposed on appellee, was determined on the basis of its net income, and was payable in any event, even though no dividends might ever be declared to its shareholders.

There is no British income tax on dividends as such. In paying the British income tax, appellee did so as a taxpayer and not as an agent for its shareholders. The mere fact that it was permitted, though not required, under the British practice, to deduct from dividends paid, if any, a proportionate amount of the tax, does not change the fact that it paid the taxes on its own behalf as a tax-

payer. Such deductions from dividends did not result in any reimbursement to appellee of its own income tax payment; having paid the tax, its income available for dividends was merely the lesser sum.

To speak of the payment of the income tax by appellee as a "withholding" is simply a misnomer contrary to facts. It was required to pay the tax to the British Government on *its* entire net income even though (1) it made no payment whatever to its stockholders and (2) the stockholders had no income from this or any other source.

The construction contended for by appellant would result in confusion in the administration of our tax laws and often would result in an unfair and unjust duplication of deductions, defeating the collection of tax revenues.

The statute is plain and unambiguous, leaving no need for departmental construction. There has been no uniform and long continued rule of construction by the courts, the Board or the Treasury Department. The informal Bureau rulings relied upon by appellant "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." As a matter of fact, the Bureau's views on this question have changed from time to time. At the present time the Department is contending in various cases before the Board precisely in accordance with appellee's contentions herein.

ARGUMENT.

The detailed argument of appellee on this question is set forth in the brief filed for appellee in the case of *Welch v. St. Helens Petroleum Co., Ltd.,* No. 7488, now pending before this Court, which is included herein by reference.

CONCLUSION.

Appellee submits that for the reasons set forth above the Court below properly held that appellee was entitled to a deduction of $52,507.73 in its income tax return for the fiscal year ended May 31, 1924, on account of income taxes paid during said year to the Government of Great Britain.

Respectfully submitted,

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,

DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

15

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,

Appellee.

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Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Defendant and Appellant:

PEIRSON M. HALL, Esq.,
United States Attorney,

ROBERT W. DANIELS, Esq.,
Assistant United States Attorney,

ALVA C. BAIRD, Esq.,
Assistant United States Attorney,

EUGENE HARPOLE, Esq.,
Special Attorney,

Bureau of Internal Revenue,

Federal Building,

Los Angeles, California.

For Plaintiff and Appellee:

MILLER, CHEVALIER, PEELER & WILSON, Esqs.,

JOSEPH D. PEELER, Esq.,

Title Insurance Building,

Los Angeles, California.

United States of America, ss.

EH

A

To THE ST HELENS PETROLEUM COMPANY, LTD., a corporation and to: MILLER, CHEVALIER, PEELER & WILSON, its attorneys,

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City f San Francisco, in the State of California, on the 8th day of March, A. D. 1934, pursuant to Order Allowing Appeal filed FEBRUARY 17, 1934 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, vs. REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, No. 4258-C, wherein REX B. GOODCELL, Former Collector of Internal Revenue, is Defendant and Appellant, and you are Plaintiff and Appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 17th day of February, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave
U. S. District Judge for the Southern District of California.

Receipt is acknowledged of a copy of the within Citation, together with a copy of the Petition for Appeal, Assignments of Error and Order Allowing Appeal herein.

DATED: FEBRUARY 17th, 1934.

MILLER, CHEVALIER, PEELER & WILSON,
By Joseph D. Peeler
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Feb 17 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

THE ST. HELENS PETROLEUM COMPANY, LTD, a Corporation, Plaintiff,	
-v-	At Law No. 4258-C COMPLAINT
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	

NOW COMES the plaintiff, The St. Helens Petroleum Company, Ltd., a corporation, and through its attorneys complains of the defendant, Rex B. Goodcell, and as and for a cause of action against said defendant alleges:

I.

That the plaintiff, The St. Helens Petroleum Company, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the jurisdiction of this court is dependent upon a Federal question in that the cause arises under the laws of the United States of America pertaining to internal revenue, to-wit, the Revenue Act of 1921 and subsequent Acts.

III.

That the defendant, Rex B. Goodcell, was, from March 6, 1922 to April 5, 1926, inclusive, the Collector of Internal Revenue for the Sixth Collection District of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City of Los Angeles, in said State of California.

IV.

That this action is brought against the defendant as an officer acting under and by virtue of the Revenue Act of 1921 and later Acts on account of acts done under color of his office, and of the Revenue Laws of the United States as will hereinafter more fully appear.

V.

That the plaintiff duly filed with the defendant as the proper officer designated by statute, its corporation income tax returns for the fiscal year ended May 31, 1922 as required by law and within the periods prescribed by law, that is, on to-wit, August 15, 1922, November 24, 1922, February 15, 1923, and October 22, 1923.

VI.

That the defendant, Rex B. Goodcell, as Collector of Internal Revenue for the Sixth Collection District of California, demanded and exacted payment under protest and duress from the plaintiff, of taxes shown on said returns in the following amounts and on the following dates, to-wit:

July 15, 1922	$7,500.00
November 15, 1922	136.58
November 24, 1922	11,465.31
February 15, 1923	5,732.65
February 15, 1923	3,818.29
May 15, 1923	3,818.29
May 16, 1923	4,859.49
October 22, 1923	852.40
Credit—May 15, 1922	873.16
	$39,056.17
Less adjustment	10.00
	$39,046.17

VII.

That thereafter, on March 11, 1929, Galen H. Welch, the succeeding Collector of Internal Revenue for the Sixth Collection District of California, exacted from plaintiff the payment under protest and duress of an additional tax of $2,166.21, together with interest in the amount of $819.14, making a total of $2,985.35 on account of said income tax returns for the fiscal year ended May 31, 1922. The plaintiff has paid on account of said returns a total tax of $41,212.38, together with interest in the amount of $819.14.

VIII.

On November 20, 1923, plaintiff filed with the defendant, a claim for credit on the form provided by the Commissioner of Internal Revenue, setting forth an overpayment of $10,631.87 on said returns for the fiscal year ended May 31, 1922, and asking that said overpayment be credited against the taxes due on plaintiff's return for the fiscal year ended May 31, 1923.

IX.

On July 17, 1926, plaintiff filed with the Collector of Internal Revenue, on the form provided by the Commissioner of Internal Revenue, a claim for refund for the fiscal year ended May 31, 1922, claiming a refund of $7,500.00 or such greater amount as was legally refundable, setting forth the following reasons for said claim:

"This claim for refund is filed in order to protect the taxpayer's right to any refund that may appear to be due when final audit of the taxpayer's 1921 returns have been completed by the Commissioner of Internal Revenue, including also any refund that may appear to be due as result of any deduction allowable under the law on account of income taxes paid to a foreign government on income from sources within the United States."

X.

On May 3, 1930, plaintiff filed with the Collector of Internal Revenue on the form provided by the Commissioner of Internal Revenue, a claim for refund for the fiscal year ended May 31, 1922, in the amount of $25,000.00, setting forth the following grounds for said claim:

"1. In computing the allowance for Depreciation on Wells, the Commissioner allowed only $8,372.67 on the Nutt Lease, as compared with the correct figure of $20,395.60. The error arises from overlooking cost of $66,132.15 prior to May 31, 1920, as set forth in Form O, Schedule VI.

"2. In computing income, the Commissioner properly allowed the deduction of 92.76 per cent of the British profits taxes accrued during the taxable year, based on the proportion of income from sources within the United

States, but failed to allow any deduction for British income taxes accrued during the taxable year. On the same basis, this deduction would be as follows:

Total income tax accrued	£ 17,827-4-0	
@ 4.14	$ 73,804.61	
92.76% applicable to U. S. income		$68,461.16

"Our contentions have been set forth in full in briefs heretofore filed with the Department."

XI.

That on November 7, 1928, the Commissioner of Internal Revenue rejected the claim for credit filed on November 20, 1923, and the claim for refund filed on July 17, 1926, as announced in letter from the Commissioner of Internal Revenue dated November 7, 1928, symbols as follows: IT:FAR:SM-60D LMS-28935-C-28938-A-28936-D-28939-B-28937-E-28940. That the Commissioner of Internal Revenue has taken no action on the claim for refund filed May 3, 1930, neither rejecting nor allowing same, although a period of six months has elapsed since said claim was filed. That the Commissioner of Internal Revenue has refused and failed to refund or credit any of the taxes and interest overpaid for the fiscal year ended May 31, 1922.

XII.

That the taxes heretofore collected from the plaintiff for the fiscal year ended May 31, 1922 are excessive to the extent of $13,617.81, for the reasons set forth in the claim for credit and the claims for refund heretofore presented to the Commisioner of Internal Revenue, which are the same as the grounds set forth herein as the basis for this proceeding.

XIII.

That in computing the allowance for depreciation on wells with respect to the Nutt Lease, the Commissioner has allowed only $8,372.67, whereas the correct amount is $20,395.60. The error arises from the failure of the Commissioner of Internal Revenue to take into consideration the cost of $66,132.15 prior to May 31, 1920, apparently through oversight.

XIV.

During the fiscal year ended May 31, 1922, Plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £ 17,827-4-0 sterling, which, at the rate of $4.14 is the equivalent of $73,804.61 in United States currency. The Commissioner of Internal Revenue has determined that the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922 was 92.76 per centum of the total net income of plaintiff. Acordingly, under Section 234 of the Revenue Act of 1921, plaintiff is entitled to a total deduction on account of said British income taxes of 92.76 per centum of $73,804.61, or a net amount of $68,461.16. In determining the taxes heretofore paid by the plaintiff for the fiscal year ended May 31, 1922, the Commissioner of Internal Revenue has not allowed any deduction on account of said British income taxes.

XV.

That the defendant erroneously and illegally collected from the plaintiff, and is erroneously and illegally withholding from plaintiff and is indebted to said plaintiff in the total amount of $11,451.60, with interest thereon as provided by law, representing amounts illegally exacted from plaintiff on account of income taxes for the fiscal year ended May 31, 1922.

XVI.

That although often demanded the defendant has not nor has anyone on his behalf repaid or refunded said sum or sums or any part thereof, and said claim of said plaintiff herein is the sole property of plaintiff and has not been sold or assigned or transferred to any person or individual.

WHEREFORE, plaintiff prays for judgment against the defendant, Rex B. Goodcell, in the amount of $11,-451.60, together with interest at 6 per centum from dates of payment as provided by law.

Joseph D. Peeler
Melvin D. Wilson
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

CHARLES DRADER and R. W. STEPHENS being first duly sworn, on oath depose and say:

That The St. Helens Petroleum Company, Ltd., plaintiff herein, is a corporation organized under the laws of Great Britain, with its principal office and place of business at Los Angeles, California.

That said CHARLES DRADER and R. W. STEPHENS are its attorneys-at-law and in-fact in charge of its business in the United States and duly authorized to verify this complaint. That they have read the complaint and that the facts contained therein are true to the best of their knowledge and belief.

Charles Drader
R. W. Stephens

Subscribed and sworn to before me this 6th day of November, A. D. 1930.

[Seal] Ethel E. Jones

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 6, 1930. R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Rex B. Goodcell, and in answer to the above-entitled complaint admits, alleges and denies, to-wit:

I.

Denies specifically each and every allegation contained in paragraph I of said complaint.

II.

Admits each and every allegation contained in paragraph II of said complaint.

III.

Admits each and every allegation contained in paragraph III of said complaint.

IV.

Admits each and every allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V, the defendant admits that plaintiff filed its corporation income tax returns for the fiscal year ended May 31, 1922, and further admits that

three of such returns were filed on August 15, 1922, November 24, 1922 and October 22, 1923, respectively.

Denies that one of said returns was filed on February 15, 1923, as alleged and avers that such return was filed on November 14, 1923.

Denies specifically each and every other allegation contained in said paragraph.

VI.

Answering paragraph VI, defendant admits the allegations therein contained except as to that certain payment of taxes therein alleged to have been made on July 15, 1922 in the sum of $7,500.00. Defendant avers with regard to such payment that it was in fact made on August 15, 1922. Further answering said paragraph VI, the defendant specifically denies that the payment of the taxes therein described was made under protest and duress, as alleged.

VII.

Answering paragraph VII, the defendant admits the allegations contained therein except the averment therein appearing that the payment of additional tax and interest was exacted from the plaintiff under protest and duress, which averment the defendant specifically denies.

VIII.

Answering paragraph VIII, the defendant admits that on November 20, 1923, plaintiff filed with the defendant a claim for credit in the sum of $10,631.87, covering the fiscal year ended May 31, 1922. In this behalf the defendant affirmatively alleges that said claim for credit was not based on the grounds alleged in plaintiff's complaint herein as required by Section 3226 of the Revised Stat-

utes as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, and further avers that, as a result thereof, the plaintiff cannot here recover on said claim.

IX.

Answering paragraph IX, defendant admits that the plaintiff on July 17, 1926, filed a claim for refund for $7,500.00 for the fiscal year ended May 31, 1922, as alleged therein. Defendant affirmatively alleges in this behalf that said claim for refund was not based on the grounds alleged and set forth in the complaint herein as required by Section 3226 of the Revised Statutes as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, and further avers that as a result thereof, plaintiff cannot here recover on said claim.

X.

Answering paragraph X, the defendant admits that on May 3, 1930, the plaintiff filed a claim for refund of $25,000.00 for the fiscal year ended May 31, 1922 and that said claim contained the recitals set forth in said paragraph X, but the defendant affirmatively alleges that said claim for refund was filed more than four years after the amounts sought to be recovered in this action were paid by plaintiff to the defendant, as required by Section 3228 of the Revised Statutes as amended by Section 1112 of the Revenue Act of 1926, and that by reason thereof the plaintiff cannot here recover on said claim.

XI.

Admits the allegations contained in paragraph XI of said complaint.

XII.

Denies specifically each and every allegation contained in paragraph XII of said complaint.

XIII.

Denies specifically each and every allegation contained in paragraph XIII of said complaint.

XIV.

Denies specifically each and every allegation contained in paragraph XIV of said complaint.

XV.

Denies specifically each and every allegation contained in paragraph XV of said complaint.

XVI.

Answering paragraph XVI, defendant admits that he has not repaid or refunded to the plaintiff any part of the sum sought to be recovered herein.

Denies specifically each and every other allegation contained in said paragraph.

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint and that defendant have his costs of suit.

SAMUEL W. McNABB
United States Attorney,

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney,

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

Alva C. Baird
ALVA C. BAIRD,
Special Attorney, Bureau of Internal Revenue,

Richard W. Wilson
RICHARD W. WILSON,
Special Attorney, Bureau of Internal Revenue.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

REX B. GOODCELL, being first duly sworn, deposes and says: That he is the defendant named in the within entitled action and is the identical person designated in the title thereof as former Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

Rex B. Goodcell
Rex B. Goodcell.

Subscribed and sworn to before me this 30th day of December, 1930.

[Seal] J. M. Kugler
Notary Public.

[Endorsed]: Filed Dec. 30, 1930. R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULAtED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

DATED: This 8th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON,
By Joseph D. Peeler
Attorneys for Plaintiff,

Samuel W. McNabb,
SAMUEL W. McNABB,
United States Attorney,

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 9, 1931. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AND ORDER CONSOLIDATING CASES FOR TRIAL.

It is hereby stipulated by and between the plaintiff and defendant above named, through their respective attorneys, that the above-entitled cause may be consolidated for trial with the case of The St. Helens Petroleum Company,

Ltd. v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, case #4252-C, which is set for trial on the 28th day of April, 1931.

This stipulation is entered into for the reason that the above cases are so similar in fact and law that it would be a waste of time for the court and the parties concerned to try the cases separately.

Feb. 24, 1931

Joseph D Peeler
Melvin D Wilson
Attorneys for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker,
IGNATIUS F. PARKER,
Assistant United States Attorney.

Richard W Wilson
Special Attorney, Bureau of Internal Revenue.
Attorneys for Defendant.

ORDER

Upon reading the above stipulation and good cause appearing therefor, the court hereby transfers the above-entitled cause to the trial calendar and department of the Honorable Judge Cosgrave.

Wm P. James
Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

CONSENT

Upon reading the above stipulation and the order of the Honorable Judge James appearing above, I hereby consent to and accept the transfer of the above cause to my department.

Geo. Cosgrave

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

ORDER

Upon reading the above stipulation and the above order and consent transferring the above-entitled cause to the Honorable Judge Cosgrave's department, the court hereby consents and orders that the above cases be consolidated for trial before the Honorable Judge Cosgrave on the 28th day of April, 1931.

Geo. Cosgrave

Judge of the District Court of the United States, In and for the Southern District of California, Central Division.

[Endorsed]: Filed Feb. 25, 1931 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

ST. HELENS PETROLEUM COMPANY, LTD., a corporation,
Plaintiff,
vs.
GALEN H. WELCH, Collector of Internal Revenue,
Defendant.
No. 4252

ST. HELENS PETROLEUM COMPANY, LTD., a corporation,
Plaintiff,
vs.
GALEN H. WELCH, Collector of Internal Revenue,
Defendant.
No. 4255

ST. HELENS PETROLEUM COMPANY, LTD., a corporation,
Plaintiff,
vs.
REX B. GOODCELL, Collector of Internal Revenue,
Defendant.
No. 4258

MOTION TO REOPEN CASE FOR THE PURPOSE OF ADMITTING ADDITIONAL EVIDENCE AS STIPULATED

COME NOW the plaintiff and defendant by and through their respective attorneys and move this Honorable Court to reopen the above entitled cases to admit in evidence additional facts as set forth in Stipulation of Additional Facts filed herewith.

The purpose of this additional evidence is to enable the Court to determine whether it has jurisdiction of all or any part of said proceedings and, if it has jurisdiction, to assist it in determining the amount of the judgments to be entered.

DATED: This 6th day of November, 1933.

Joseph D. Peeler
Joseph D. Peeler,
Attorney for Plaintiff.
Peirson M. Hall
Peirson M. Hall, E. H.
United States Attorney,
Alva C. Baird
Alva C. Baird, E. H.
Assistant United States Attorney.
Eugene Harpole
Eugene Harpole,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

It is so Ordered:

Geo. Cosgrave
Judge.

[Endorsed]: Filed Nov 6 1933, R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

That the plaintiff, The St. Helens Petroleum Company, Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, the then Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal year ended May 31, 1922, on August 15, 1922, November 24, 1922, February 14, 1923, and October 22, 1923.

III.

That the plaintiff paid to the defendant, Rex B. Goodcell, as Collector of Internal Revenue, upon demand, the amounts of taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1922	$ 7,500.00
November 15, 1922	136.58
November 24, 1922	11,465.31
February 15, 1923	5,732.65
February 15, 1923	3,818.29
May 15, 1923	3,818.29
May 16, 1923	4,859.49
October 22, 1923	852.40
Credit—May 15, 1923	872.16
	$39,056.17
Less adjustment	10.00
Total	$39,046.17

IV.

That thereafter, on March 11, 1929, the plaintiff paid to Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, upon demand, an additional tax of $2,166.21, together with interest in the amount of $819.14, or a total of $2,895.35, on account of said income tax returns for the fiscal year ended May 31, 1922.

V.

That on May 3, 1930, July 17, 1926, and November 20, 1923, plaintiff filed with the Commissioner of Internal Revenue, claims for refund of income taxes paid for the fiscal year ended May 31, 1922, in the form and manner

provided by law, covering the issues raised in the complaint herein.

VI.

That the Commissioner of Internal Revenue has failed to take any action with respect to the claim for refund filed on May 3, 1930. That on November 7, 1928, the Commissioner of Internal Revenue rejected the claim for credit filed on November 30, 1923, and the claim for refund filed on July 17, 1926, and announced his rejection of said claims in a letter dated November 7, 1928.

VII.

That plaintiff is entitled to a further deduction for depreciation on wells, with respect to the Nutt Lease, in the amount of $12,022.93, for the fiscal year ended May 31, 1922.

VIII.

That during the fiscal year ended May 31, 1922, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £17,827-4-0 Sterling, which, at the rate of $4.14 was the equivalent of $73,-804.61 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of the total net income of plaintiff from all sources during said year. The amount of British income tax allocable to United States income was $68,461.16. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16.

IX.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for

the fiscal year ended May 31, 1922, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for said fiscal year.

X.

The taxable net income of the plaintiff for the fiscal year ended May 31, 1921, as determined by the Commissioner of Internal Revenue, was $2,350,425.78. The profits tax of plaintiff for said fiscal year was determined under the provisions of Section 328, Revenue Acts of 1918 and 1921, as follows:

Profits tax, Section 328 (1920 rates)	$568,803.04
Profits tax, Section 328 (1921 rates)	464,444.13
7/12 of $568,803.04	331,801.77
5/12 of $464,444.13	193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328 –	$525,320.16

The income tax of plaintiff for said fiscal year was determined as follows:

Net income –		$2,350,425.78
Less: Interest on United States obligations not exempt –	$143,352.56	
Profits tax –	525,320.16	668,672.72
Amount taxable at 10% –		$1,681,753.06
Income tax at 10% –		$ 168,175.31

CONCLUSIONS OF LAW.

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 31, 1922, in the amount of $12,022.93 for further depreciation on wells, and in the amount of $68,461.16 for income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deductions.

The court determines that the defendant, Rex B. Goodcell, erroneously and illegally collected from plaintiff the sum of $11,451.60, and that the plaintiff is entitled to recover from defendant the sum of $11,451.60, together with interest thereon as provided by law.

That the plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: November 17, 1933.

Geo. Cosgrave
United States District Judge

Approved as to form according to Rule 44.

Alva C. Baird
E. H.

[Endorsed]: Filed Nov. 17, 1933. R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE ST. HELENS PETROLEUM CO. LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 4258-C.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant.	)	

JUDGMENT ON FINDINGS.

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel,

Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings and ordered that judgment be entered in favor of plaintiff in accordance with said findings;

NOW, THEREFORE, by virtue of the law, and by reason of the findings aforesaid, it is considered by the Court that the plaintiff have judgment in the amount of $11,451.60, together with interest at the rate of 6 per cent, as provided by law, on $852.40, from October 22, 1923; on $4,859.49 from May 16, 1923; on $4,690.45 from May 15, 1923, and on $1,049.26 from February 15, 1923, with costs taxed at $20.00.

Judgment rendered this Nov. 17, 1933.

Geo. Cosgrave
United States District Judge.

CERTIFICATE OF PROBABLE CAUSE.

The Court certifies that the defendant, Rex B. Goodcell, as Collector of Internal Revenue, exacted and received payment of the monies recovered herein in the performance of his official duty, and that there was probable cause for the act done by the defendant, and that he was acting

under the directions of the Secretary of the Treasury, or other proper officer of the Government.

Geo. Cosgrave
United States District Judge.

Approved as to form as required by Rule 44.

Peirson M. Hall
Pierson M. Hall,
E. H.
United States Attorney.

Alva C. Baird
Alva C. Baird,
E. H.
Assistant United States Attorney.
ATTORNEYS FOR DEFENDANT.

Joseph D. Peeler
Joseph D. Peeler,
ATTORNEY FOR PLAINTIFF.

JUDGMENT ENTERED NOVEMBER 17th, 1933. R. S. ZIMMERMAN, Clerk, By Francis E. Cross, Deputy Clerk.

[Endorsed]: Filed Nov. 17, 1933. R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE ST. HELENS PETROLEUM COMPANY, LTD., a Corporation,	)	
Plaintiff and Appellee	)	
vs.	)	At Law
	)	No. 4258-C.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant and Appellant	)	

BILL OF EXCEPTIONS

Be it remembered that heretofore to-wit, on the 28th day of April, 1931, the above-entitled cause came on regularly for trial at Los Angeles, California, upon the issues joined herein, before his Honor, George Cosgrave, sitting as Judge of the above-entitled Court, without a jury, a jury having been duly waived by the parties by written Stipulation as follows:

"IT IS HEREBY STIPULATED by and between counsel for the respective parties that trial by jury in the above case is expressly waived.

"Dated: This 8th day of April, 1931.

MILLER, CHEVALIER, PEELER & WILSON
BY JOSEPH D. PEELER,
Joseph D. Peeler
Attorneys for Plaintiff,

Samuel W. McNabb,
Samuel W. McNabb,
United States Attorney,

Ignatius F. Parker,
Ignatius F. Parker,
Assistant U. S. Attorney,
Attorneys for Defendant"

Messrs. Miller, Chevalier, Peeler & Wilson by Joseph D. Peeler, Esq. appeared for plaintiff, and the defendant appeared by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker and Louis Somers, Assistant United States Attorneys for said District, and Richard W. Wilson, Special Attorney, Bureau of Internal Revenue, and the parties introduced in evidence a Stipulation as to certain facts, which had been agreed upon by both parties, which Stipulation (omitting the Exhibits therein referred to) is as follows:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

THE ST. HELENS PETROLEUM CO. LTD., a Corporation,	:	
Plaintiff,	:	
-v-	:	No. 4258-C.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	:	
Defendant.	:	

STIPULATION OF FACTS.

It is hereby stipulated and agreed by the parties, plaintiff and defendant, in this action, by their respective counsel, that the following statements of fact are true and correct, and shall be accepted and used as agreed evidence in this case, provided, however, that nothing herein shall prevent either party from introducing other and further evidence, not inconsistent herewith.

I.

That the plaintiff, The St. Helens Petroleum Company, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, the then Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal year ended May 31, 1922, on August 15, 1922, November 24, 1922, February 14, 1923, and October 22, 1923.

III.

That the plaintiff paid to the defendant, Rex B. Goodcell, as Collector of Internal Revenue, upon demand, the amounts of taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1922	$ 7,500.00
November 15, 1922	136.58
November 24, 1922	11,465.31
February 15, 1923	5,732.65
February 15, 1923	3,818.29
May 15, 1923	3,818.29
May 16, 1923	4,859.49
October 22, 1923	852.40
Credit – May 15, 1922	872.16
	$39,056.17
Less adjustment	10.00
Total	$39,046.17

IV.

That thereafter, on March 11, 1929, the plaintiff paid to Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, upon demand, an additional tax of $2,166.21, together with interest in

the amount of $819.14, or a total of $2,985.35, on account of said income tax returns for the fiscal year ended May 31, 1922.

V.

That on May 3, 1930, plaintiff filed with the Commissioner of Internal Revenue, a claim for refund of income taxes paid for the fiscal year ended May 31, 1922, in the form and manner shown by photostatic copy herewith, marked Exhibit No. 1.

VI.

That on July 17, 1926, plaintiff filed with the Commissioner of Internal Revenue, a claim for refund of income taxes paid for the fiscal year ended May 31, 1922, in the manner and form shown by photostatic copy herewith, marked Exhibit No. 2.

VII.

That on November 20, 1923, plaintiff filed with the Commissioner of Internal Revenue, a claim for credit of taxes paid for the fiscal year ended May 31, 1922, in the manner and form shown by photostatic copy herewith, marked Exhibit No. 3.

VIII.

That the Commissioner of Internal Revenue has failed to take any action with respect to the claim for refund filed on May 3, 1930. That on November 7, 1928, the Comissioner of Internal Revenue rejected the claim for credit filed on November 30, 1923, and the claim for re-

fund filed on July 17, 1926, and announced his rejection of said claims in a letter dated November 7, 1928.

IX.

That plaintiff is entitled to a further deduction for depreciation on wells, with respect to the Nutt Lease, in the amount of $12,022.93, for the fiscal year ended May 31, 1922.

X.

That during the fiscal year ended May 31, 1922, the plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £ 17,827-4-0 Sterling, which at the rate of $4.14 was the equivalent of $73,804.61 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of the total net income of plaintiff from all sources during said year. Plaintiff contends, and defendant denies, that plaintiff is entitled to a deduction, in determining its taxable net income, of the income taxes so accrued and paid to the Government of Great Britain; but it is agreed that if said taxes are deductible, the amount of said deduction for the fiscal year ended May 31, 1922 is $68,461.16. It is also stipulated that plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16, on account of said British income taxes.

XI.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for

the fiscal year ended May 31, 1922, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for the fiscal year ended May 31, 1922.

Joseph D. Peeler
Miller, Chevalier, Peeler & Wilson,
Counsel for Plaintiff.

Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

C. N. CHAREST,
General Counsel, Bureau of Internal Revenue,

Richard W. Wilson
Richard W. Wilson,
Special Attorney, Bureau of Internal Revenue.

Approved:

.....

United States District Judge.

[Endorsed]: Filed Apr. 28, 1931 R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

(Testimony of A. P. McEachren)

A. P. McEACHREN,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am local secretary for the Kern River Oilfields of California, Ltd. and the St. Helens Petroleum Co. Ltd. My duties are those of office manager and chief accountant. The books of these companies have been handled under my direct supervision from July 1919 to date. I am familiar with the oil lease called the Nutt Well No. 1. It comprises 20 acres located in the Montebello Field and was acquired on May 8, 1919. The capital expenditure on the one well that was drilled on that property from the date of acquisition to June 1, 1920, amounted to $66,-132.15. They were capital additions and not included in the revenue. They were depreciable assets. In auditing the returns of the St. Helens Petroleum Company for the fiscal year ended May 31, 1921, and 1922, respectively, the Government failed to allow a depreciation on account of those sums totaling $66,132.15 owing to inadvertence or error on the part of the Internal Revenue Agent, apparently, he overlooked the capital expenditures to Nutt Well No. 1 to May 31, 1920. He allowed depreciation to the capital additions from July 1, 1920. The period from June 1 to May 31st was a fiscal year adopted by the corporation. The figures I have given are from the books of the St. Helens Petroleum Co., Ltd. and are true and correct to the best of my knowledge and belief.

Counsel for the respective parties thereupon entered into the following Stipulation in open Court:

"MR. PEELER: There is just one thing I overlooked, and should have stated. This involves British cases and British law, and by agreement, we have not attempted to put into evidence the British law or the British cases. I don't know whether the court will take judicial notice of them automatically or not, but we would like to stipulate that the court may take judicial notice of the British law incorporated in the briefs of counsel.

"MR. WILSON: That is agreeable to the Government, your Honor.

"THE COURT: Very well."

Pursuant to said Stipulation made in open Court, the plaintiff in its opening Brief cited the following British cases and British law:

Act of 1842, Section 54.

British Income Tax 1918, Schedule D, Par. 359.

British Income Tax 1918, Schedule D, Par. 394.

General Rules, Paragraph 420,

General Rules, Paragraph 439.

Law of Income Tax, E. M. Konstam, K. C., 1923.

Bradbury v. English Sewing Cotton Company, Ltd., (1922) 2 K. B. 589.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Gold Fields American Development Company, Ltd., v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times 14 (1926).

Rex v. Purdie (1914) 3 K. B. 112, 111 Times Law Reports 531.

Sheldrick v. South African Breweries, Ltd. (1923) 1 K. B. 173, at 191.

Defendant cited British cases and British law as follows in his Brief:

Ashton Gas Company v. Attorney General (1906) 75 L. J. Ch. 1, 93 L. T. 676.

Bart, Sir Marcus Samuel, v. The Commissioner of Inland Revenue, 34 T. L. R. 552 (Vol 7, Great Britain Tax Cases, p. 27)

Brooke v. Commissioners of Inland Revenue (7 T. C. 261) (1918) 1 K. B. p. 257.

Commissioners of Inland Revenue v. John Blott (H. L. 1921) 2 A. C. 171.

Mylam (Surveyor of Taxes) v. The Market Harborough Advertiser Company, Ltd., 21 T. L. R. 201, Great Britain Tax Cases, Vol. 5, p. 95.

Scottish Union and National Insurance Company v. New Zealand and Australian Land Company (1921), 1. App. Cas. 172.

Sheldrick v. South African Breweries, Ltd. (1923), 1 K. B. 173.

"Income Tax", F. G. Underhay.

"The Law of Income Tax", Second Edition, E. M. Konstam, K. C.

Report of Commissioner of Inland Revenue for the fiscal year ended March 31, 1922.

"Taxation of Business in Great Britain", Department of Commerce, Trade Promotion Series, No. 60, p. 65.

Great Britain:

Income Tax Act 1918 and Finance Acts 1919 to 1925, Inc.

Schedule D, paragraph 359.

Schedule D, paragraph 394,
Section 237, Act of 1918.
General Rules, paragraph 420.
General Rules, paragraph 439.
General Rules, paragraph 442.

In its Reply Brief, plaintiff cited British law and British cases as follows:

Konstam, Income Tax, pp. 19 and 20.

Ashton Gas Company v. Attorney General, 75 L. J. Ch. 1.

Bradbury v. English Sewing Cotton Co., Ltd., 2 K. B. 589.

Commissioners v. Blott, 2 A. C. 171.

Gold Fields American Development Company, Ltd. v. Consolidated Gold Fields of South Africa, Ltd., 135 The Law Times, 14.

Ritson v. Phillips, 131 L. T. 384; 9 Tax. Cas. 10

Thereupon the respective parties having rested, plaintiff, by its counsel, moved for judgment on the record and asked for special Findings of Fact, and the defendant, by his counsel, moved for judgment for the defendant on the oral and documentary evidence introduced. The Court reserved its ruling on said motions until the final decision of the case.

Briefs were filed and the cause submitted for decision. Thereafter and on the 21st day of September, 1933, the Court made the following Minute Order:

At a stated term, to wit: The SEPTEMBER Term, A. D. 1933, of the District Court of the United States of America, within and for the CENTRAL Division

of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES on THURSDAY the 21st day of SEPTEMBER in the year of our Lord one thousand nine hundred and thirty-three. Present:

The Honorable GEO. COSGRAVE, District Judge.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	Nos. 4252 4255
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue.	Nos. 4258-H 4045-H (Dismissed)
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff vs. REX B. GOODCELL, Collector of Internal Revenue, Defendant.	Nos. 4253-M 4256-M 4257-J Law
KERN RIVER OILFIELDS OF CALIFORNIA, LTD., a corporation, Plaintiff vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4254-J Law

These consolidated causes having under date of April 28, 1931 come before the Court for hearing, and having been ordered submitted on Stipulation of Facts filed and briefs to be filed, and briefs having been filed, and the Court having duly considered the matter, it is now by the Court ordered:

"The question presented in this case is whether, in computing its net taxable income, a foreign corporation is entitled to deduct income taxes paid a foreign country when such taxes so paid were, as permitted by the laws of the foreign country, deducted from dividends paid to its stockholders. The Revenue Act applicable to the years involved in clear language allows such deduction, but the government maintains that since the corporation is empowered to deduct from the dividends payable to its stockholders the amount of such tax, it does not come within the meaning of the Revenue Act.

"I think the position of the government is not well-founded. The foreign corporation in the express language of the Revenue Act is entitled to a deduction of such payments and I regard as entirely incidental the circumstance that under the laws of the foreign country the corporation is entitled to credit to the tax so paid when it comes to paying dividends to its shareholders. The interpretation sought by the government would change a/provision of ~~statute~~ statute in which there is no ambiguity whatever. This may not be done. (Gould v. Gould, 245 U. S. 151).

"Judgment is therefore ordered in favor of the plaintiffs with exception to defendant.

Pursuant to a Motion to re-open the case for the admission of additional evidence, and the Order of the Court made on said Motion, the following Stipulation of Additional Facts was submitted to the Court:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4252
ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. GALEN H. WELCH, Collector of Internal Revenue, Defendant.	No. 4255
ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff, vs. REX B. GOODCELL, Collector of Internal Revenue, Defendant.	No. 4258

STIPULATION OF ADDITIONAL FACTS

IT IS HEREBY STIPULATED AND AGREED by the parties, plaintiff and defendant in these actions, by their respective counsel, that the following statements of fact are true and correct and shall be accepted and used as agreed evidence in these cases, in addition to the evidence heretofore presented to the Court.

I.

On November 7, 1928, the Commissioner of Internal Revenue issued a letter to the St. Helens Petroleum Company, Ltd., setting forth his final determination of its tax liability for the fiscal years ended May 31, 1917 to May 31, 1922, inclusive. A copy of said letter of November 7, 1928, is attached hereto, marked Exhibit A.

II.

It is stipulated that said letter of November 7, 1928, sets forth the final determinations by the Commissioner of Internal Revenue, of the net income, income tax, and profits tax of the St. Helens Petroleum Company, Ltd., for the fiscal years ended May 31, 1921 and 1922, respectively, as well as the method and figures used in said determinations.

III.

Nothing in this stipulation of facts is to be construed as an admission by the plaintiff that said determinations and computations of the net income, income tax or profits

tax by the Commissioner of Internal Revenue, for either of the fiscal years ended May 31, 1921 and May 31, 1922, respectively, are correct, insofar as they are inconsistent with the stipulation of facts heretofore introduced in these actions.

JOSEPH D. PEELER
Joseph D. Peeler,
ATTORNEY FOR PLAINTIFF

PEIRSON M. HALL
Peirson M. Hall,
U. S. Attorney

ALVA C. BAIRD
Alva C. Baird,
Assistant U. S. Attorney

EUGENE HARPOLE
Eugene Harpole,
Special Attorney, Bureau of Internal Revenue
ATTORNEYS FOR DEFENDANTS

COPY

Nov. 7, 1928.

IT:AR:SM
LMS–28935–D–28939
A–28936–E–28940
B–28937
C–28938

St. Helens Petroleum Company, Ltd.,
1100 Chapman Building,
Los Angeles, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the fiscal years ended May 31, 1917 to May 31, 1922, inclusive, discloses a deficiency of $277,368.73 for the fiscal years ended May 31, 1921 and May 31, 1922, and overassessments aggregating $412,333.38 for the fiscal years ended May 31, 1917 to May 31, 1920, inclusive as shown in the attached statement.

The sections of the law above mentioned allow you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. B. Allen,
Deputy Commissioner,

Enclosures:
Statement
Form 866
Form 882.

STATEMENT

IT:FAR:SM-60–D
LMS–28935–C–28938
A–28936–D–28939
B–28937–E–28940

In re: St. Helens Petroleum Company, Ltd.,
1100 Chapman Building,
Los Angeles, California.

Fiscal Years Ended:	Deficiency in Tax	Overassessment
May 31, 1917		$ 75,862.08
1918		130,653.69
1919		124,526.94
1920		81,290.67
1921	$275,202.52	
1922	2,166.21	
Totals	$277,368.73	$412,333.38

Reference is made to your protest dated November 26, 1926, against the findings of the Bureau relative to the audit of your income and profits tax returns for the fiscal years ended May 31, 1917 to May 31, 1922, inclusive, as set forth in Bureau letter dated November 12, 1926.

After a careful examination and review of your protest and of the additional information submitted in conference held on January 21, 1927 and subsequent thereto, you are advised that the Bureau holds that the denial of your

application for the assessment of your excess profits tax for the fiscal year ended May 31, 1917 under the provisions of Section 210 of the Revenue Act of 1917 is correct inasmuch as there has been disclosed no exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of Section 210 and the tax computed by reference to the representative concerns specified in that Section.

Your profits tax liability for the fiscal years ended May 31, 1918 to May 31, 1922, inclusive, has been redetermined under the provisions of Sections 210 and 328 of the Revenue Acts of 1917, 1918 and 1921, respectively, based upon the additional information submitted.

The detailed computation of your tax liability for the fiscal years ended May 31, 1917 to May 31, 1922, inclusive, is as follows:

St. Helens Petroleum Company, Ltd. Statement.

Year ended May 31, 1917

Schedule 1

Net Income

Net income shown in Bureau letter dated November 12, 1926	$143,560.83
As corrected	142,543.40
Deduction	$ 1,017.43
Deduction:	
(a) Total depreciation allowed	106,742.65
Previously allowed	105,725.22
Additional depreciation	$ 1,017.43

Explanation of Item Changed

(a) Depreciation on wells has been adjusted in accordance with the attached schedule. No change has been made in depreciation on field equipment as previously allowed.

Schedule 2

Invested Capital

Capital stock		$ 723,862.98
Surplus		1,791.96
Total beginning of year shown by books as disclosed by Schedule 2, Revenue Agent's report dated September 30, 1922		$ 725,654.94
Additions:		
(a) Increase in value of properties	$543,384.39	
(b) Nonoperating wells	8,547.74	
(c) McLeod Lease Suspense	232,052.83	
(d) Depreciation reserve	168,094.86	
(e) Sale of capital stock	119,774.54	
(f) Unpaid dividends	2,371.48	
Total additions		1,074,225.84
Total		$1,799.880.78

St. Helens Petroleum Company, Ltd.		Statement.
Forward		$1,799,880.78
Reductions:		
(g) Storm loss	$ 9,337.84	
(h) Depletion	245,160.57	
(i) Impounded cash, McLeod Lease	295,712.73	
(j) Accrued British Income Tax	46,976.95	
(k) Income tax prorated	2,145.49	
(l) Dividends	1140,931.61	
Total reductions		740,265.19
Invested capital as corrected		$1,059,615.59

Explanation of Items

(a) Property values with respect to leaseholds and wells have been adjusted to conform to the values shown in the attached schedules. The value allowed for field equipment is that shown by books. The McLeod Lease properties have been eliminated for invested capital purposes, since the income from this lease was impounded and not included in taxable income by reason of a suit pending against the occupants of the lands on which this lease was located.

(b) As adjusted in Schedule 2, Revenue Agent's report dated September 30, 1922.

(c) McLeod Lease items eliminated from liabilities for reasons given under item (a) above.

(d) Reserve for depreciation decreased to conform to the attached schedules after elimination of depreciation on McLeod Lease.

(e) Sale of capital stock January 24, 1917 $337,546.44
Average for 4-8/31 months $119,774.54

(f) Unpaid dividends as at May 31, 1916, reduced to the amount shown in protest dated March 1, 1927.

(g) Storm loss is eliminated from invested capital since the loss occurred prior to the taxable year and is carried on the books as a deferred expense.

(h) Reserve for depletion is adjusted to conform to the attached depletion schedule.

St. Helens Petroleum Company, Ltd. Statement.

(i) Impounded cash of McLeod Lease eliminated for reasons given under item (a).

(j) Accrued British income taxes, liability for which was not set up on books.

(k) Preceding year's income tax $3,881.28 prorated.

(l) Inasmuch as date of payment of dividend has not been furnished the total amount is eliminated from invested capital as of the beginning of the taxable year.

Schedule 3

Computation of Tax

Excess Profits Tax

Net income, Schedule 1		$142,543.40
Invested capital, Schedule 2	$1,059,615.59	
Less:		
.00547% account of foreign income	5,796.10	

Invested capital employed in the United States				$1,053,819.49
Deduction:				
8% of invested capital				$ 84,305.56
Income	Deductions	Balance	Rate	Tax
$142,543.40	$84,305.56	$58,237.84	20%	$11,647.57
Profits tax—$11,647.57 reduced to 5/12				$ 4,853.15

Income Tax

Net income	$142,543.40	
Less: Excess profits tax	4,853.15	
Taxable at 2%	$137,690.25	$ 2,753.81

St. Helens Petroleum Company, Ltd. Statement.

Amounts brought forward		$4,853.15
		2,753.81
5/12 of net income	$59,393.08	
Less:		
Excess profits tax	4,853.15	
Taxable at 4%		2,181.60
Total tax		$ 9,788.56
Previously assessed:		
Original tax assessed, August 1917, Page 2, Line 21		$2,054.03
Assessed September 1917, Page 3, Line 29		1,326.41
Assessed May 1918, Page 366 Line 9		5,264.04
Assessed January 1921, Account #400001		8,178.67
Assessed August, 1922, Account #400221		70,881.52
Total		$ 87,704.67

Less:	
Tax abated – C – 146614	2,054.03
Balance tax assessed	$ 85,650.64
Tax liability	9,788.56
Overassessment	$ 75,862.08

Fiscal Year May 31, 1918

Schedule 4

Net Income

Net income shown in Bureau letter dated November 12, 1926	$ 175,038.50
As corrected	173,397.83
Deductions.	$ 1,640.67

St. Helens Petroleum Company, Ltd. Statement.

Deductions:		
(a) Depreciation	$1,038.18	
(b) Depletion	602.49	
Total deductions		$1,640.67

Explanation of Items Changed.

(a) The basis of this adjustment is set forth in Schedule 1(a) herein.

Total depreciation allowed	$106,076.54
Previously allowed	105,038.36
Additional depreciation	$ 1,038.18

(b) Depletion is allowed in accordance with the attached schedules. The total allowance for the taxable year

is based on the 1917 and 1918 law and regulations proportioned to the proper periods included in the taxable year.

Depletion under 1917 law	$95,296.71	
7/12 for fiscal year		$ 55,589.75
Depletion under 1918 law	117,568.12	
5/12 for fiscal year		48,986.72
Total allowed		$104,576.47
Depletion previously allowed		103,973.98
Additional depletion		$ 602.49

Schedule 5

Computation of Tax – 1917 Law

Net income, Schedule 4	$173,397.83	
Less:		
Profits tax, Section 210	10,820.02	$10,820.02
Amount taxable at 2% and 4%	$162,577.81	
Tax at 2%		3,251.56
Tax at 4%		6,503.11
Total tax under 1917 law		$20,574.69

St. Helens Petroleum Company, Ltd. Statement.

Schedule 6

Computation of Tax – 1918 Law

Net income, Schedule 4	$173,397.83	
Less:		
Profits tax, Section 328	42,465.13	$42,465.13
Amount taxable at 12%	$130,932.70	15,711.92
Total tax under 1918 law		$58,177.05

SUMMARY.

7/12 of tax under 1917 law	$12,001.90
5/12 of tax under 1918 law	24,240.44
Total tax for fiscal year ended May 31, 1918	$36,242.34
Taxes previously assessed:	
August 1918 List, Page 16, Line 11	$22,932.60
Account #400222	143,963.43
Total tax assessed	$166,896.03
Less:	
Total tax liability	36,242.34
Overassessment	$130,653.69

Year ended May 31, 1919

Schedule 7

Net income shown in Bureau letter dated November 12, 1926	$ 63,007.49
As corrected	62,107.06
Deduction	$ 900.43

St. Helens Petroleum Company, Ltd. Statement.

Deductions:

(a)	Depreciation on wells	$67,571.76
	Depreciation on equipment	18,692.24
	Total allowed	$86,264.00
	Previously allowed	85,363.57
	Additional depreciation	900.43

(a) The basis of this adjustment is explained in Schedule 1(a) herein.

Schedule 8

Computation of Tax.

Net income, Schedule 7	$ 62,107.06	
Less:		
Profits tax, Section 328	None	
Amount taxable at 12% and 10%		$62,107.06
Tax at 12% (1918) rate)		7,452.85
Tax at 10% (1919 rate)		6,210.71

Summary of Taxes

7/12 of tax at 1918 rate	$ 4,347.49
5/12 of tax at 1919 rate	2,587.79
Total tax liability for fiscal year ended May 31, 1919	$ 6,935.28
Tax previously assessed:	
Account #400141	$106,850.14
Account #40122	3,897.74
Account #400081	20,714.34
Total Tax assessed	$131,462.22
Less: Total tax liability	6,935.28
Overassessment	$124,526.94

St. Helens Petroleum Company, Ltd. Statement.

Year ended May 31, 1920

Schedule 9

Net income as shown in Bureau letter dated November 12, 1926	$49,316.67
As corrected	49,599.34
Additions	$ 282.67

Additions:

(a) Depreciation

(b) Depletion

Explanation of Items Changed

(a) Explained in Schedule 1(a) herein.

Depreciation on wells	$70,545.04	
Depreciation on equipment	25,740.16	
Total allowed		$96,285.20
Previously allowed		96,517.87
Amount disallowed		232.67

(b) Depletion is allowed in accordance with the attached schedules.

Depletion previously allowed	$61,144.03
Total allowable	61,094.03
Amount disallowed	50.00

Schedule 10

Computation of Tax

Net income	$49,599.34	
Less:		
Profits tax, Section 328	None	
Amount taxable at 10%		$49,599.34
St. Helens Petroleum Company, Ltd.		Statement.
Total tax liability (10% of $49,599.34)		$ 4,959.93
Total tax assessed:		
Account #400020		$ 4,865.10
Account #400140		81,385.50
Total tax assessed		$ 86,250.60

Less:		
Total tax liability		4,959.93
Overassessment		$ 81,290.67

Year ended May 31, 1921

Schedule 11

Net income as shown in Bureau letter dated November 12, 1926		$2,705,115.12
As corrected		2,350,425.78
Net adjustment		354,689.34
Additions:		
(a) Impounded funds	$48,790.97	
(b) Increase in profit on sale of McLeod Lease	23,001.57	
Total additions	$71,792.54	
Deductions:		
(c) Depreciation	$ 64,200.02	
(d) Depletion	300,779.68	
(e) California audit fee	1,110.00	
(f) McLeod Lease excess profits duty	29,529.70	
(g) British corporation profits taxes	23,695.53	
(h) London Office expense	7,166.95	
Total deductions	426,481.88	
Net adjustment as above		$ 354,689.34

St. Helens Petroleum Company, Ltd. Statement.

Explanation of Items Changed.

(a) The net income on McLeod Lease impounded funds is revised as follows:

Impounded income as shown on page 7 of office letter dated November 11, 1926	$1,707,992.83
Add:	
Depreciation on wells and equipment	66,031.98
	$1,774,024.81
Deduct:	
Difference in value of Liberty Bonds entered on books and the value at date of release of impounded funds as shown in schedule*d* transmitted with letter from your representatives dated March 1, 1927	17,241.01
Impounded income as corrected	$1,756,783.80
As previously determined	1,707,992.83
Increase	$ 48,790.97

(b) The increased profit on sale of McLeod Lease is determined as follows:

Payments received in year of sale		$1,070,000.00
Depletion sustained on cost as shown in attached schedules		25,949.37
Depreciation sustained		72,153.54
Cost or value at basic date	$20,000.00	
Cost of subsequent additions:		
Legal expenses in 1921	91,880.23	
Bonus plus interest, 1921	11,578.00	

Cost of equipment and labor	95,677.51	
Profit on sale for fiscal year 1921	948,967.17	
	$1,168.102.91	$ $1,168,102.91
Profit on sale as above	948,967.17	
As previously determined	925,965.60	
Increase	$ 23,001.57	

St. Helens Petroleum Company, Ltd. Statement.

(c) The basis of this adjustment is explained in Schedule 1(a) herein. Accumulated depreciation sustained on McLeod lease wells and equipment is included in the total depreciation allowed.

Depreciation allowed on wells	$184,271.72
Depreciation allowed on field equipment	42,050.82
Total allowed	$226,322.54
Previously allowed	$162,122.52
Additional depreciation	$ 64,200.02

(d) Explained in Schedule 9 (b) herein

Total depletion allowed	$612,925.17
Previously allowed	312,145.49
Additional depletion	$300,779.68

(e) (f) (g) and (h) These adjustments are based on the additional information furnished by your representatives under dates of January 17, 1927 and March 1, 1927.

Schedule 12

Computation of Tax

Profits tax, Section 328 (1920 rates)			$568,803.04
Profits tax, Section 328 (1921 rates)			464,444.13
7/12 of $568,803.04			331,801.77
5/12 of $464,444.13			193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328			$525,320.16
Net income		$2,350,425.78	
Less:			
Interest on United States Obligations not exempt	$143,352.56		
Profits tax	525,320.16	668,672.72	
Amount taxable at 10%		$1,681,753.06	168,175.31
Total tax liability			$693,495.47

St. Helens Petroleum Company, Ltd. Statement.

Forward		$693,495.47
Less taxes previously assessed:		
Account #401796	$32,928.24	
Account #400080	18,546.31	
Account #400080	21,702.09	
Account #400041	345,116.31	418,292.95
Deficiency		$275,202.52

Year ended May 31, 1922

Schedule 13

Net income as shown in Bureau letter dated November 12, 1926	$264,473.36
As corrected	245,913.17
Net adjustment	$ 18,560.19
Additions:	
(a) Depreciation	$ 11,547.06
Deductions:	
(b) London office expense and British corporation profits tax	30,107.25
Net deduction as above	$ 18,560.19

Explanation of Items Changed

(a) Explained in Schedule 1(a) herein.

Depreciation on wells	$131,233.37
Depreciation in equipment	46,890.24
Total allowed	$178,123.61
Previously allowed	189,670.67
Amount disallowed	$ 11,547.06

(b) This adjustment is based on the information submitted by your representatives in supplemental protest dated January 17, 1927.

St. Helens Petroleum Company, Ltd. Statement.

Schedule 14

Computation of Tax

1921 Rates

Net income	$245,913.17	
Less:		
Profits tax, Section 328	26,779.94	$ 26,779.94
Amount taxable at 10%	$219,133.23	21,913.32
Total tax at 1921 rates		$ 48,693.26

1922 Rate

Net income	$245,913.17	
Tax on above at 12½%		30,739.15

Summary of Taxes

7/12 of tax at 1921 rates ($48,693.26)		28,404.40
5/12 of tax at 1922 rates (30,739.15)		12,807.98
Total tax liability for fiscal year		$ 41,212.38
Less taxes previously assessed:		
Account #402133	$15,273.16	
Account #400040	22,930.61	
Account #400101	842.40	39,046.17
Deficiency		$ 2,166.21

In accordance with the above conclusions, the claims listed below will be adjusted as indicated in the following schedule:

St. Helens Petroleum Company, Ltd. Statement.

Kind	Year	Amount	Allowed	Rejected
Refund	1917	$49,282.73	$49,282.73	
Refund	1917	35,000.00	26,579.35	$8,420.65
Refund	1917	10,000.00		10,000.00
Refund	1918	10,000.00	91,345.88	
Credit	1918	35,964.57	35,964.57	
Refund	1919	10,000.00	121,692.73	
			Allowed	
Credit 1916-1918-1920		8,054.21	1918 portion	$3,343.24
			1919 "	2,834.21
			1920 "	1,753.62
			Rejected	
			1916 portion	123.14
			Allowed	Rejected
Credit & Refund	1920	6,537.23	19,537.05	
Refund	1920	10,000.00	10,000.00	
Refund	1920	50,000.00	50,000.00	
Refund	1921	50,000.00		50,000.00
Refund	1921	15,000.00		15,000.00
Refund	1922	7,500.00		7,500.00
Credit	1922	10,631.87		10,631.87

The overassessments indicated above will be made the subject of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284(a) of the Revenue Act of 1926.

The Collector of Internal Revenue will also be notified of the above rejections.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

A copy of this letter has been furnished your authorized representatives, Miller and Chevalier, Southern Building, Washington, D. C.

The right of appeal to the United States Board of Tax Appeals as indicated on page one of this letter applied only to those years in which there is a deficiency in tax as defined by Section 273 of the Revenue Act of 1926.

[Endorsed]: Filed Nov. 6, 1933 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

On the 17th day of November, 1933, defendant filed a Motion for Arrest of Judgment, which said Motion, omitting the Memorandum of Points and Authorities thereto attached, is as follows:

IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

ST. HELENS PETROLEUM COMPANY, LTD. Plaintiff,	NO. 4258-C
Vs.	
REX B. GOODCELL, Former Collector of Internal Revenue, Defendant.	MOTION FOR ARREST OF JUDGMENT.

Now on this 14th day of November, 1933, comes Rex B. Goodcell, defendant in the above-entitled cause, by his attorneys, Peirson M. Hall United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and moves that judgment in the above-entitled cause be arrested, as to him, upon the following grounds and for the following reasons:

1. That no substantial or sufficient evidence has been introduced in the case upon which to base a judgment for the plaintiff.

2. That this Court has no jurisdiction of the subject matter of this action, the tax having been assessed under the "special assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921. (40 Stat. 1092, 1093).

Dated: This 14th day of November, 1933.

Peirson M. Hall √
PEIRSON M. HALL, U. S. ATTORNEY,
E. H.

Alva C. Baird √
ALVA C. BAIRD, ASST. U. S. ATTORNEY,
E. H.

Eugene Harpole √
EUGENE HARPOLE, SPECIAL ATTORNEY,
Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 17, 1933 R. S. Zimmerman, Clerk, By L. Wayne Thomas, Deputy Clerk

Subsequently and on the 17th day of November, 1933, the Court entered the following Minute Order of its Action upon said Motion for Arrest of Judgment:

At a stated term, to wit: The SEPTEMBER Term, A. D. 1933, of the District Court of the United States of America within and for the CENTRAL Division of the Southern District of California, held at the Court Room thereof in the City of LOS ANGELES on FRIDAY the 17th day of NOVEMBER in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable GEO. COSGRAVE District Judge.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff,	
vs.	No. 4252-C-Law
GALEN H. WELCH, Collector, etc., Defendant.	
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff,	
vs.	No. 4255-C-Law.
GALEN H. WELCH, Collector, etc., Defendant.	
THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff,	
vs.	No. 4258-C-Law.
REX B. GOODCELL, Former Collector, etc., Defendant.	

The Court having duly considered the motion of the Government for arrest of Judgment, filed on November

14th, 1933, in No. 4252-C, Law; and the motions of the Government for arrest of judgment, each filed on November 17, 1933, in cases 4255-C and 4258-C, Law, respectively, and having duly considered the Memorandum of Points and Authorities filed November 16, 1933, in opposition to motions for arrest of judgment,

IT IS NOW by the Court ORDERED that the said three motions in arrest of judgment be, and the same are hereby, denied, and that exceptions be noted for the defendant.

On the said 17th day of November, 1933, the Defendant filed and presented to the Court the following Request for Findings of Fact and Conclusions of Law:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE ST. HELENS PETROLEUM CO. LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	NO. 4258-C.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth District of California,	)	
Defendant.	)	

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Defendant above-named, by and through his attorneys, Peirson M. Hall, United States Attorney

for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and hereby requests the Court that in rendering and making its judgment in the above-entitled cause, which has been submitted to the Court, said Court make specific findings of fact and conclusions of law upon the issues included in said cause, as set forth in the proposed Findings of Fact and Conclusions of Law hereto attached.

Peirson M. Hall √
PEIRSON M. HALL E. H.
U. S. Attorney,
Alva C. Baird √
ALVA C. BAIRD E. H.
Assistant U. S. Attorney,
Eugene Harpole
EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue,
Attorneys for Defendant.

Considered and denied

Exceptions noted.

Geo. Cosgrave,
Judge.

FINDINGS OF FACT.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

II.

The tax involved in this action was assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

CONCLUSIONS OF LAW.

I.

That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

II.

That this Court has no jurisdiction of the subject matter of this action, the tax involved having been assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

III.

That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause.

Dated: This ..... day of ....., 1933.

.....

UNITED STATES DISTRICT JUDGE.

Approved as to form as provided by Rule 44:

.....

.....

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 17, 1933 R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

Plaintiff presented the following Findings of Fact and Conclusions of Law to the Court on the 17th day of November, 1933:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

THE ST. HELENS PETROLEUM CO. LTD., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 4258-C.
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,	)	
Defendant.	)	

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above case came on regularly for trial on the 28th day of April, 1931, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Joseph D. Peeler and Melvin D. Wilson, Esqs., and Miller, Chevalier, Peeler & Wilson, its attorneys, and the defendant appearing by Samuel W. McNabb, Esq., United States Attorney for the Southern District of California, Ignatius F. Parker, Esq., Assistant United States Attorney for said District, C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, and Richard W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue; and evidence, both oral and documentary, having been re-

ceived and the Court having fully considered the same, hereby makes the following special findings of fact:

I.

That the plaintiff, The St. Helens Petroleum Company, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

II.

That the plaintiff filed with Rex B. Goodcell, the then Collector of Internal Revenue for the Sixth Collection District of California, its original and amended income tax returns for the fiscal year ended May 31, 1922, on August 15, 1922, November 24, 1922, February 14, 1923, and October 22, 1923.

III.

That the plaintiff paid to the defendant, Rex B. Goodcell, as Collector of Internal Revenue, upon demand, the amounts of taxes shown on said returns in the following amounts and on the following dates, to-wit:

August 15, 1922	$ 7,500.00
November 15, 1922	136.58
November 24, 1922	11,465.31
February 15, 1923	5,732.65
February 15, 1923	3,818.29
May 15, 1923	3,818.29
May 16, 1923	4,859.49
October 22, 1923	852.40
Credit – May 15, 1923	872.16
	$39,056.17
Less adjustment	10.00
Total	$39,046.17

IV.

That thereafter, on March 11, 1929, the plaintiff paid to Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, upon demand an additional tax of $2,166.21, together with interest in the amount of $819.14, or a total of $2,895.35, on account of said income tax returns for the fiscal year ended May 31, 1922.

V.

That on May 3, 1930, July 17, 1926 and November 20, 1923, plaintiff filed with the Commissioner of Internal Revenue, claims for refund of income taxes paid for the fiscal year ended May 31, 1922, in the form and manner provided by law, covering the issues raised in the complaint herein.

VI.

That the Commissioner of Internal Revenue has failed to take any action with respect to the claim for refund filed on May 3, 1930. That on November 7, 1928, the Commissioner of Internal Revenue rejected the claim for credit filed on November 30, 1923, and the claim for refund filed on July 17, 1926, and announced his rejection of said claims in a letter dated November 7, 1928.

VII.

That plaintiff is entitled to a further deduction for depreciation on wells, with respect to the Nutt Lease, in the amount of $12,022.93, for the fiscal year ended May 31, 1922.

VIII.

That during the fiscal year ended May 31, 1922, plaintiff accrued and paid to the Government of Great Britain,

an income tax in the amount of £17,827-4-0 Sterling, which, at the rate of $4.14 was the equivalent of $73,804.61 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of the total net income of plaintiff from all sources during said year. The amount of British income tax allocable to United States income was $68,461.16. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16

IX.

That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1922, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for said fiscal year.

X.

The taxable net income of the plaintiff for the fiscal year ended May 31, 1921, as determined by the Commissioner of Internal Revenue, was $2,350,425.78. The profits tax of plaintiff for said fiscal year was determined under the provisions of Section 328, Revenue Acts of 1918 and 1921, as follows:

Profits tax, Section 328 (1920 rates)	$568,803.04
Profits tax, Section 328 (1921 rates)	464,444.13
7/12 of $568,803.04	331,801.77
5/12 of $464,444.13	193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328 –	$525,320.16

The income tax of plaintiff for said fiscal year was determined as follows:

Net income –		$2,350,425.78
Less: Interest on United States obligations not exempt –	$143,352.56	
Profits tax –	525,320.16	668,672.72
Amount taxable at 10% –		$1,681,753.06
Income tax at 10% –		$ 168,175.31

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts, the Court determines that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff deductions on its income tax return for the fiscal year ended May 31, 1922, in the amount of $12,022.93 for further depreciation on wells, and in the amount of $68,461.16 for income taxes accrued and paid to the government of Great Britain, and in levying tax assessments on the basis of net income computed without the allowance of said deductions.

The court determines that the defendant, Rex B. Goodcell, erroneously and illegally collected from plaintiff the sum of $11,451.60, and that the plaintiff is entitled to recover from defendant the sum of $11,451.60, together with interest thereon as provided by law.

That the plaintiff is also entitled to costs of suit herein.

That judgment be entered against the defendant accordingly.

DATED: November 17, 1933.

Geo. C. Cosgrave
United States District Judge.

Approved as to form according to Rule 44.

Alva C. Baird
E. H.

[Endorsed]: Filed Nov. 17, 1933. R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

Whereupon the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the Plaintiff, and adopted, made and entered the same as it Findings of Fact and Conclusions of Law herein and rejected the Findings of Fact and Conclusions of Law requested by the defendant to which the defendant noted an exception and on the 24th day of November, 1933, the following Order was duly made and entered by the Court:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

ST. HELENS PETROLEUM COMPANY, LTD., a corporation, Plaintiff,	NO. 4258-C.
vs.	ORDER ALLOWING
REX B. GOODCELL, former Collector of Internal Revenue, Defendant.	EXCEPTIONS

IT IS ORDERED that exception in favor of the defendant, to the Court's action in adopting and entering the Conclusions of Law and Judgment presented by the plaintiff and in refusing to adopt the Findings of Fact and Conclusions of Law presented by the defendant, be entered on the minutes of the court as of the 17th day of November, 1933, by the Clerk, nunc pro tunc.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE

Approved as to form under Rule 44 and no objection offered to entry of the Order.

Joseph D. Peeler
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 24, 1933 R. S. Zimmerman, Clerk, By L. Wayne Thomas, Deputy Clerk.

STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for Plaintiff, Appellee, and Defendant, Appellant, that the foregoing Bill of Exceptions contains all evidence given and proceedings had in the trial of this action material to the Appeal of defendant, and that it may be approved, allowed and settled by the Judge in the above-entitled Court as correct in all respects; that the same shall be made a part of the record in said case and be the Bill of Exceptions therein and that said Bill of Exceptions may be used by either plaintiff or defendant upon any Appeal taken by plaintiff or defendant, and that said Bill may be certified and signed by the Judge upon presentation of this Stipulation without further notice to either party hereto or to their respective counsel.

Dated: This 26th day of April, 1934.

MILLER, CHEVALIER, PEELER & WILSON,
BY Joseph D. Peeler
Attorneys for Plaintiff and Appellee.

Peirson M. Hall D
PEIRSON M. HALL,
United States Attorney,

Robert W. Daniels
ROBERT W. DANIELS,
Asst. U. S. Attorney,

Alva C. Baird, E. H.
ALVA C. BAIRD,
Assistant U. S. Attorney

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS

The *following* Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties plaintiff or defendant upon any appeal taken by either party plaintiff or defendant.

Dated: This 27th day of April, 1934.

Geo Cosgrave
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM.

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and good cause appearing therefor;

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions is hereby extended to and including February 17, 1934.

IT IS FURTHER ORDERED that for the purpose of making and filing the Bill of Exceptions herein and having same settled and allowed, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including February 17, 1933.

Dated: November 23, 1933.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Nov. 24, 1933. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TERM

Upon motion of the Defendant, and good cause appearing therefor,

IT IS ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein, was entered, the Term of this Court is hereby extended to and including May 8, 1934.

DATED: February 7, 1934.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Feb 7—1934 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS

Upon motion of the Defendant, and good cause appearing therefor:

IT IS ORDERED that the time within which the Defendant herein may serve and file his proposed Bill of Exceptions is hereby extended to and including May 8, 1934.

DATED: February 17, 1934.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed Feb 17 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

TO: THE HONORABLE GEORGE COSGRAVE, JUDGE OF THE ABOVE COURT:

NOW COMES the Defendant, Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California, and feeling himself aggrieved by the Judgment entered in this cause, hereby prays that an appeal may be allowed, to-wit: from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this Petition Petitioner hereby presents his Assignment of Errors.

DATED: FEBRUARY 16th, 1934.

Peirson M. Hall E. H.
PEIRSON M. HALL,
United States Attorney,
Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant U. S. Attorney,
Eugene Harpole.
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Feb 16 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE ST. HELENS PETROLEUM CO., LTD., a corporation, Plaintiff,	)	
vs.	)	No. 4258-C. ASSIGNMENT OF ERRORS
REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth District of California, Defendant.	)	

The Defendant and Appellant above-named makes and files the following assignment of errors upon which he will rely in the prosecution of his appeal from the judgment of this Court entered herein on the 17th day of November, 1933.

I.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff in the sum of $11,451.60, together with interest thereon and costs taxed in the sum of $20.00, in that the evidence introduced herein, the facts stipulated, and those facts established and found therefrom by the Court and the record in this cause are insufficient to support a judgment in favor of the plaintiff in said amount, or in any other sum, or at all.

II.

The Court erred in rendering judgment for the plaintiff and against the defendant herein, for the reason that the evidence introduced and facts stipulated disclose that plaintiff is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1922, accrued and paid to the Government of Great Britain an income tax equivalent to $73,804.61 in United States currency and that the plaintiff deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16 on account of said British income taxes.

III.

The Court erred in rendering judgment for the plaintiff and against the defendant herein for the reason that the facts found by the Court are insufficient to support a judgment for the plaintiff, the Court having found from the evidence introduced and facts stipulated herein:

"I.

"That the plaintiff, The St. Helens Petroleum Company, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

"VIII.

"That during the fiscal year ended May 31, 1922, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £17,827-4-0 Sterling, which, at the rate of $4.14 was the equivalent of $73,-804.61 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of the total net income of plaintiff from all sources during

said year. The amount of British income tax allocable to United States income was $68,461.16. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16.

"IX.

"That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1922, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for said fiscal year.

"X.

"The taxable net income of the plaintiff for the fiscal year ended May 31, 1921, as determined by the Commissioner of Internal Revenue, was $2,350,425.78. The profits tax of plaintiff for said fiscal year was determined under the provisions of Section 328, Revenue Acts of 1918 and 1921, as follows:

Profits tax, Section 328 (1920 rates)	$568,803.04
Profits tax, Section 328 (1921 rates)	464,444.13
7/12 of $568,803.04	331,801.77
5/12 of $464,444.13	193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328—	$525,320.16

The income tax of plaintiff for said fiscal year was determined as follows:

Net income—		$2,350,425.78
Less: Interest on United States obligations not exempt—	$143,352.56	
Profits tax—	525,320.16	668,672.72
Amount taxable at 10%—		$1,681,753.06
Income tax at 10%—		$ 168,175.31"

IV.

The Court erred in finding and concluding as a matter of law herein that any part of the amount of $68,461.16 accrued and paid by the plaintiff to the Government of Great Britain as an income tax during the fiscal year ended May 31, 1922, and deducted by plaintiff from dividends paid by it to its stockholders during said fiscal year was deductible from plaintiff's gross income for said year in computing the correct income tax due from it to the Government of the United States.

V.

The Court erred in refusing to adopt the Defendant's Proposed Finding of Fact number I, which reads as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a judgment in its favor in the above-entitled action," for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

VI.

The Court erred in refusing to adopt the Defendant's Proposed Finding of Fact number II, which reads as follows:

"II.

"The tax involved in this action was assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1921",

for the reason that the record and the evidence in this case disclose that the tax involved in this action was assessed under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

VII.

The Court erred in refusing to adopt the Defendant's Proposed Conclusions of Law numbered I, II and III, which read as follows:

"I.

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

"II.

"That this Court has no jurisdiction of the subject matter of this action, the tax involved having been assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

"III.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause",

for the reason that the evidence introduced and the facts found by the Court in this action support and require the adoption of said Conclusions of Law and disclose that the Court is without power or jurisdiction to enter a judgment for the plaintiff herein.

VIII.

The Court erred in concluding as a matter of law that the Commissioner of Internal Revenue erred in failing and refusing to allow to plaintiff a deduction on its income tax return for the fiscal year ended May 31, 1922, in the amount of $68,461.16 for income taxes accrued and paid to the Government of Great Britain, for the reason that the evidence introduced and the facts found therefrom by the Court disclose that the amount of $68,461.16 so paid

by plaintiff was by it deducted from dividends paid by it to its stockholders during said fiscal year.

IX.

The Court erred in denying Defendant's Motion for Arrest of Judgment herein for the reason that the evidence introduced herein and the facts found therefrom by the Court disclose that plaintiff's income and profits taxes for the fiscal year ended May 31, 1922, were assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921, and the Court is without power or jurisdiction to recompute the tax determined by the Commissioner of Internal Revenue.

X.

The Court erred in holding that it had jurisdiction or power to review the determination of the Commissioner of Internal Revenue of the plaintiff's net income and the amount of income and profits tax due thereon for the taxable year ending May 31, 1922, for the reason that said net income and the tax due thereon were determined by the Commissioner of Internal Revenue under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093).

XI.

That the Court erred in denying the defendant's Motion for Arrest of Judgment herein for the reason that there was no substantial or sufficient evidence introduced in the case upon which to base a judgment for the plaintiff and the further reason that the Court had no jurisdiction or power to review the discretion of the Commissioner of Internal Revenue in determining plaintiff's net income and the tax due thereon for the taxable year ending May 31,

1922, the tax having been determined and assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093).

XII.

The Court erred in its Conclusions of Law for the reason that said Conclusions are not supported by the facts found by the Court herein.

XIII.

The Court erred in concluding as a matter of law that the defendant had illegally collected from the plaintiff the sum of $2,985.35 and that the plaintiff is entitled to judgment against the defendant for the following reasons: (1) That the Court was and is without power or jurisdiction to review the discretion of the Commissioner of Internal Revenue in determining the plaintiff's net income and the tax due thereon for the taxable year ending May 31, 1922, the tax having been determined and assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093); (2) That the tax, of which a refund is sought in this action, was determined, assessed, collected and paid as an excess profits tax within the meaning of sections 327 and 328 of the Revenue Acts of 1918 and 1921.

XIV.

The Court erred in adopting its Finding of Fact numbered X for the reason that the same is not supported by the evidence in that the evidence and pleadings disclose that plaintiff's income tax for the taxable year ending May 31, 1922 was not increased by the Commissioner of Internal Revenue but that the deficiency determined arose

from additional excess profits tax determined by the Commissioner.

Dated: This 16th day of February, 1934.

Peirson M. Hall E. H.
PEIRSON M. HALL,
U. S. Attorney,
Alva C. Baird E. H.
ALVA C. BAIRD,
Asst U. S. Attorney,
Eugene Harpole
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.
Counsel for Defendant.

[Endorsed]: Filed Feb 16 1934 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL

IT IS HEREBY ORDERED that the appeal prayed for in the Petition for Appeal in the above entitled cause be allowed.

DATED: FEBRUARY 17, 1934.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Feb. 17 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

AMENDED PRAECIPE

TO: R. S. Zimmerman, Clerk of the United States District Court, Southern District of California:

YOU ARE HEREBY REQUESTED to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. Stipulation Waiving Jury.
5. Stipulation and Order Consolidating Cases for Trial.
6. Motion and Order Re-opening cases for additional evidence.
7. Court's Fndings of Fact and Conclusions of Law.
8. Judgment.
9. Order, dated November 23, 1933, Extending Time Within Which to Serve and File the Bill of Exceptions and Extending Term.
10. Order, dated February 7, 1934, Extending Term.
11. Petition for Appeal.
12. Assignment of Errors on Appeal.
13. Order Extending Time Within Which to Serve and File Bill of Exceptions, dated February 17, 1934.
14. Order Allowing Appeal.

15. Bill of Exceptions.
    (a) Stipulation Waiving Jury.
    (b) Stipulation of Facts with Exhibits omitted.
    (c) Testimony of A. E. McEachren.
    (d) Stipulation of Counsel and citations of British Law and Cases.
    (e) Minute Order dated September 21, 1933.
    (f) Stipulation of Additional Facts.
    (g) Defendant's Motion for Arrest of Judgment with Memorandum of Points and Authorities Omitted.
    (h) Minute Order dated November 17, 1933.
    (i) Defendant's Request for Findings of Fact and Conclusions of Law.
    (j) Plaintiff's Findings of Fact and Conclusions of Law.
    (k) Order Allowing Exceptions.
16. Clerk's Certificate and this Amended Praecipe.

Dated: This 26th day of April, 1934.

Peirson M. Hall D.
PEIRSON M. HALL,
United States Attorney.

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney.

Alva C. Baird E. H.
ALVA C. BAIRD,
Assistant United States Attorney.

Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the Appellant and Appellee that the foregoing Amended Praecipe may be filed, shall be used in lieu of and replace all Praecipes heretofore filed for the purpose of the preparation of the record upon Appeal in the above-entitled action; that in preparing the record herein, the Clerk of the United States District Court may omit all endorsements except the endorsements of the filing date, from the papers requested in the foregoing Amended Praecipe.

MILLER, CHEVALIER, PEELER
& WILSON,
BY Joseph D. Peeler
Attorneys for Plaintiff and Appellee.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney,

Robert W. Daniels
ROBERT W. DANIELS,
Assistant United States Attorney,

Alva C. Baird—E. H.
ALVA C. BAIRD,
Assistant United States Attorney.

Eugene Harpole
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr 27 1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zinmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 92 pages, numbered from 1 to 92 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; stipulation waiving jury; stipulation and order consolidating cases for trial; motion to reopen case for the purpose of admitting additional evidence as stipulated; special findings of fact and conclusions of law; judgment; bill of exceptions; orders extending time within which to serve and file bill of exceptions; order extending term to file bill of exceptions; petition for appeal; assignment of errors; order allowing appeal, and amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7493

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,

Appellee.

On Appeal From the District Court of the United States, for the Southern District of California,

BRIEF FOR THE APPELLANT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.
Counsel for Appellant.

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1377

SUBJECT INDEX

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

REX B. GOODCELL, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,
Appellee.

BRIEF FOR THE APPELLANT

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California (R. 40-41), which is not reported.

Jurisdiction

This appeal involves income and profits taxes of The St. Helens Petroleum Company, Ltd., a corporation, for the fiscal year ended May 31, 1922 (R. 31-32), and is taken from a judgment of the District Court in favor of the taxpayer entered November 17, 1933 (R. 26-27). The appeal is brought to this Court by petition for appeal on behalf of the Collector of Internal Revenue filed February 16, 1934, pursuant to Section 128 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a British corporation, doing business in the United States, is entitled to deduct from gross income, income taxes paid to Great Britain when such income taxes were deducted from dividends paid to its stockholders.

2. Whether the court erred in denying appellant's motion for judgment where it appeared that the taxpayer had been allowed special assessment.

3. Whether the judgment is supported by the findings.

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved will be found in Appendices A and B in appellant's brief in the case of *Galen H. Welch, Collector, v. The St. Helens Petroleum Company, Ltd., a corporation*, No. 7488, now pending before this Court.

Statement

The facts were stipulated. (R. 31-39, 42-64.) The appellee is a corporation organized under the laws of Great Britain, having an office and place of business at Los Angeles, California (R. 31), whose income from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of its total net income from all sources during that year (R. 34).

During the fiscal year ended May 31, 1922, appellee accrued and paid to the government of Great Britain an

income tax amounting to £17,827-4-0 Sterling, which at the rate of $4.14 was the equivalent of $73,804.61 in United States currency, of which appellee deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16, on account of said British income taxes. (R. 34.)

In its income tax returns for the fiscal year ended May 31, 1922, appellee reported a tax due therein of $39,-046.17, which was duly assessed and paid to appellant, then Collector of Internal Revenue for the Sixth Collection District of California. (R. 32.) Upon an audit of the returns, the Commissioner of Internal Revenue determined a deficiency in appellee's tax for the fiscal year ended May 31, 1922, of $2,166.21 (R. 32-33, 61-62), under Section 328 of the Revenue Acts of 1918 and 1921 (R. 62), which deficiency, together with interest, amounting to $819.14, was duly assessed (R. 32-33), and appellee notified of such determination by Bureau letter dated November 7, 1928 (R. 45-64). Appellee paid such deficiency and interest to Galen H. Welch, as Collector of Internal Revenue, the successor in office to appellant (R. 6), amounting to a total of $2,985.35, on March 11, 1929 (R. 32-33).

On or about November 20, 1923, appellee filed with the Commissioner of Internal Revenue a claim for credit claiming an overpayment of $10,631.87 on said returns for the fiscal year ending May 31, 1922 (R. 6, 33), which was rejected by the Commissioner on November 7, 1928 (R. 61-63). On or about July 17, 1926, appellee filed with the Commissioner a claim for refund of $7,500 of the tax paid for the fiscal year ended May 31,

1922, claiming that the same was filed in order to protect appellee's rights to any refund that may appear to be due when final audit of said returns have been completed by the Commissioner. (R. 7, 33.) On or about May 3, 1930, appellee filed with the Commissioner of Internal Revenue a claim for refund of $25,000 of the tax paid for the fiscal year ended May 31, 1922, claiming that the Commissioner's allowance for depreciation on wells was erroneous in the amount of $12,022.93 (R. 7), which was conceded by appellant (R. 34), and allowed by the court (R. 23); and further claiming that the Commissioner had failed to allow as a deduction any part of the British income tax accrued against appellee during the taxable year (R. 7-8). Appellee contended, and appellant denied, that appellee was entitled to such deduction, but it was agreed that if said British income taxes were deductible, the amount of such deduction for the fiscal year ended May 31, 1922, was $68,461.16. (R. 34.) This amount was allowed as a deduction by the court. (R. 25, 74.) No other deductions were claimed by appellee in its claim for refund (Ex. 1), or in the complaint (R. 4-10).

The Commissioner of Internal Revenue failed to take any action with respect to the claim for refund (R. 33-34), and this suit was commenced on November 6, 1930, for the recovery of $11,451.60 (R. 4-11).

By stipulation a jury was waived, and the case was tried by the court without the intervention of a jury. (R. 30.) At the close of all the evidence, counsel for appellant moved for judgment in favor of the appellant (R. 39), and on September 21, 1933, the court, by minute

entry, ordered judgment in favor of the appellee (R. 40-41). Pursuant to order of the court on motion to reopen the case for additional evidence (R. 20, 42), a stipulation of additional facts was filed November 6, 1933 (R. 42-64). Thereafter on November 14, 1933, the appellant filed a motion in arrest of judgment (R. 64-65), which was denied by the court (R. 66-67). The appellee filed requests for special findings of fact and conclusions of law (R. 67-69), which were denied by the court (R. 75). The findings adopted by the court (R. 21-25) were those requested by the appellee (R. 70-75).

The court held that the appellee was entitled to a deduction of $12,022.93 on account of depletion on wells, and to a deduction of $68,461.16 on account of income taxes paid to the government of Great Britain and deducted from dividends to its stockholders (R. 25), and on this basis rendered judgment for the appellee for $11,451.60 (R. 26-27). From the judgment for appellee, the appellant has appealed. (R. 81.)

Specification of Errors to be Urged

The court erred (R. 82-89):

1. In rendering judgment against the appellant and in favor of the appellee in the sum of $11,451.60, together with interest thereon and costs taxed in the sum of $20, in that the evidence introduced herein, the facts stipulated, and those facts established and found therefrom by the court and the record in this cause are insufficient to support a judgment in favor of the appellee in said amount, or in any other sum, or at all.

2. In rendering judgment for the appellee and against the appellant herein, for the reason that the evidence introduced and facts stipulated disclose that appellee is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1922, accrued and paid to the government of Great Britain an income tax equivalent to $73,804.61 in United States currency and that the appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16 on account of said British income taxes.

3. In rendering judgment for the appellee and against the appellant herein for the reason that the facts found by the court are insufficient to support a judgment for the appellee, the court having found from the evidence introduced and facts stipulated herein (R. 83-84):

I.

"That the plaintiff, The St. Helens Petroleum Company, Ltd. is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

VIII.

"That during the fiscal year ended May 31, 1922, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £17,827-4-0 Sterling, which, at the rate of $4.14 was the equivalent of $73,804.61 in United States currency. That the income of plaintiff from sources within the United States during the fiscal year ended May 31, 1922, was 92.76 per centum of the total net income of plaintiff from all sources during said year. The amount of British income tax allocable to

United States income was $68,461.16. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $68,-461.16.

IX.

"That the Commissioner of Internal Revenue has allowed no deduction on account of said British income taxes for the fiscal year ended May 31, 1922, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax returns for said fiscal year.

X.

"The taxable net income of the plaintiff for the fiscal year ended May 31, 1921, as determined by the Commissioner of Internal Revenue, was $2,350,-425.78. The profits tax of plaintiff for said fiscal year was determined under the provisions of Section 328, Revenue Acts of 1918 and 1921, as follows:

Profits tax, Section 328 (1920 rates)	$568,803.04
Profits tax, Section 328 (1921 rates)	464,444.13
7/12 of $568,803.04	331,801.77
5/12 of $464,444.13	193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328—	$525,320.16

"The income tax of plaintiff for said fiscal year was determined as follows:

Net income—		$2,350,425.78
Less: Interest on United States obligations not not exempt—	$143,352.56	
Profits tax—	525,320.16	668,672.72
Amount taxable at 10%		$1,681,753.06
Income tax at 10%—		$ 168,175.31"

4. In finding and concluding as a matter of law herein that any part of the amount of $68,461.16 accrued and paid by the appellee to the government of Great Britain as an income tax during the fiscal year ended May 31, 1922, and deducted by appellee from dividends paid by it to its stockholders during said fiscal year was deductible from appellee's gross income for said year in computing the correct income tax due from it to the Government of the United States.

5. In refusing to adopt the appellant's Proposed Finding of Fact Number I, which reads as follows (R. 85):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said Proposed Finding of Fact.

6. In refusing to adopt the appellant's Proposed Finding of Fact Number II, which reads as follows (R. 85):

> "The tax involved in this action was assessed under the provisions of Section 327 and 328 of the Revenue Act of 1921,"

for the reason that the record and the evidence in this case disclose that the tax involved in this action was assessed under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

7. In refusing to adopt the appellant's Proposed Conclusions of Law numbered I, II and III, respectively, which read as follows (R. 86):

"That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

"That this Court has no jurisdiction of the subject matter of this action, the tax involved having been assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause,"

for the reason that the evidence introduced and the facts found by the Court in this action support and require the adoption of said Conclusions of Law and disclose that the Court is without power or jurisdiction to enter a judgment for the appellees herein.

8. In concluding as a matter of law that the Commissioner of Internal Revenue erred in failing and refusing to allow to appellee a deduction on its income tax return for the fiscal year ended May 31, 1922, in the amount of $68,461.16 for income taxes accrued and paid to the government of Great Britain, for the reason that the evidence introduced and the facts found therefrom by the court disclose that the amount of $68,461.16 so paid by appellee was by it deducted from dividends paid by it to its stockholders during said fiscal year.

9. In denying appellant's Motion for Arrest of Judgment herein for the reason that the evidence introduced herein and the facts found therefrom by the court disclose that appellee's income and profits taxes for the fiscal year ended May 31, 1922, were assessed under the "Spe-

cial Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921, and the court is without power or jurisdiction to recompute the tax determined by the Commissioner of Internal Revenue.

10. In holding that it had jurisdiction or power to review the determination of the Commissioner of Internal Revenue of the appellee's net income and the amount of income and profits tax due thereon for the taxable year ending May 31, 1922, for the reason that said net income and the tax due thereon were determined by the Commissioner of Internal Revenue under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

11. In denying the appellant's Motion for Arrest of Judgment herein for the reason that there was no substantial or sufficient evidence introduced in the case upon which to base a judgment for the appellee and the further reason that the court had no jurisdiction or power to review the discretion of the Commissioner of Internal Revenue in determining appellee's net income and the tax due thereon for the taxable year ending May 31, 1922, the taxes having been determined and assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

12. In its Conclusions of Law for the reason that said Conclusions are not supported by the facts found by the court herein.

13. In concluding as a matter of law that the appellant had illegally collected from the appellee the sum of $2,985.35 and that the appellee is entitled to judgment against the appellant for the following reasons:

(1) That the court was and is without power or jurisdiction to review the discretion of the Commissioner of Internal Revenue in determining the appellee's net income and the tax due thereon for the taxable year ending May 31, 1922, the tax having been determined and assessed under the "Special Assessment" provisions of Section 327 and 328 of the Revenue Acts of 1918 and 1921;

(2) That the tax, of which a refund is sought in this action, was determined, assessed, collected and paid as an excess profits tax within the meaning of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

14. In adopting its Finding of Fact numbered X for the reason that the same is not supported by the evidence in that the evidence and pleadings disclose that appellee's income tax for the taxable year ending May 31, 1922, was not increased by the Commissioner of Internal Revenue but that the deficiency determined arose from additional excess profits tax determined by the Commissioner.

Argument

This appeal involves the identical questions that are presented in the case of *Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, v. The St. Helens Petroleum Company, Ltd., a corporation*, No. 7488, now pending before this Court. The appellant's position is fully presented in the brief for the appellant filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly copies of appellant's brief in that case are served herewith upon counsel for the appellee.

Conclusion

For the reasons stated in the appellant's brief in another *The St. Helens Petroleum Company, Ltd.*, case No. 7488, it is urged that the decision of the court below in holding that amounts accrued and paid by the appellee to the government of Great Britain as an income tax and deducted by appellee from dividends paid by it to its stockholders during the fiscal year was deductible from appellee's gross income for that year, and in denying appellant's motion in arrest of judgment, was erroneous and should be reversed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWELL KEY,
M. H. EUSTACE,
Special Assistants to the Attorney General.

PEIRSON M. HALL,
United States Attorney.

ALVA C. BAIRD,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue.

January, 1935.

No. 7493.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

The St. Helens Petroleum Company, Ltd., a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

JOSEPH D. PEELER,
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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF STATUTES CITED.

No. 7493.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Rex B. Goodcell, Former Collector of Internal Revenue for the Sixth Collection District of California,
Appellant,

vs.

The St. Helens Petroleum Company, Ltd., a corporation,
Appellee.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the court below, the District Court of the United States for the Southern District of California, which is unreported, is set forth on pages 40-41 of the Transcript of Record.

JURISDICTION.

This appeal involves income and profits taxes for the fiscal year ended May 31, 1922, and is taken from a judgment of the District Court entered in favor of the taxpayer on November 17, 1933. [R. 26-27, 32.] The appeal is brought to this Court by petition for appeal filed by appellant on February 16, 1934 [R. 81], pursuant to Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. The Commissioner of Internal Revenue was required to determine, and did determine profits tax rates of appellee, as a foreign corporation, by comparison with the rates paid by representative domestic corporations. Appellant concedes, and the trial court has found, that the Commissioner erroneously overstated appellee's taxable net income because of the disallowance of certain deductions to which it was entitled. The trial court redetermined appellee's profits taxes by applying to the corrected taxable net income the rates previously determined by Commissioner and redetermined the income tax by applying to the corrected net income the rate fixed by law. Was the Court without jurisdiction to change the amount of either the profits taxes or the income tax as determined by the Commissioner?

2. During the taxable year ended May 31, 1922, the appellee paid to Great Britain certain income taxes upon its profits and subsequently deducted a corresponding amount from dividends paid by it to its stockholders during said year. Were such taxes deductible from its gross

income for said taxable year? The fundamental question is whether said taxes were imposed by Great Britain upon the corporation's income or upon the dividends paid to its stockholders.

STATUTES INVOLVED.

The applicable provisions of the Federal and British statutes will be found in the appendix attached to the brief filed in Docket No. 7488.

STATEMENT OF FACTS.

All the facts were stipulated. [R. 31-39, 42-64.] The appellee is a corporation organized under the laws of Great Britain having its principal office and place of business in Los Angeles, California. [R. 31.] During the fiscal year ended May 31, 1922, it accrued and paid to the Government of Great Britain an income tax in an amount, converted into United States currency, of $73,804.61. [R. 34.] During the same fiscal year its income from sources within the United States was 92.76 per cent of its total net income from all sources. [R. 34.] Appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $68,461.16, on account of said British taxes. [R. 34.] The parties hereto stipulated and agreed that if the plaintiff is entitled to a deduction, in determining its taxable net income, of income taxes so accrued and paid to Great Britain, the amount of said deduction for the fiscal year ended May 31, 1922, is $68,461.16. [R. 34.] The Commissioner of Internal Revenue allowed no deduction on account of

said British income taxes for the fiscal year ended May 31, 1922. [R. 34-35.]

In its tax returns for the fiscal year ended May 31, 1922, appellee reported total taxes in the amount of $39,046.17, which was duly assessed and paid to the appellant as Collector of Internal Revenue. [R. 32.] Upon an audit of the returns, the Commissioner of Internal Revenue determined a deficiency in tax for said year of $2,166.21. [R. 61-62.] In determining said deficiency, the Commissioner redetermined appellee's profits tax liability for the first seven months of said fiscal year under the provisions of Section 328, Revenue Act of 1921. [R. 47, 62.] Said deficiency was duly assessed with interest of $819.14 and paid by appellee to Galen H. Welch, Collector of Internal Revenue, on March 11, 1929. [R. 32-33.]

Within the period and in the manner provided by law, appellee filed with the Commissioner of Internal Revenue claims for refund, setting forth therein the same grounds alleged in its Complaint in the present proceeding. [R. 6-10, 13-14, 33, 74.] The Commissioner of Internal Revenue either failed to take any action with respect to said claims for refund or rejected same and after a lapse of more than six months, appellee filed its complaint in the present proceeding. [R. 11, 33-34.]

By stipulation a jury was waived and the case was tried by the Court without the intervention of a jury. [R. 30, 70.] The parties filed with the Court a stipulation of

facts, in which appellant stipulated that appellee was entitled to a further deduction for depreciation on wells in the amount of $12,022.93, for the fiscal year ended May 31, 1922. [R. 34.] The parties left for determination by the Court the question of deductibility of the British income taxes. [R. 34.] At the close of all the evidence, counsel for each party moved for judgment on the record. [R. 39.] On September 21, 1933, the Court, by minute order ordered judgment in favor of appellee. [R. 40-41.] Pursuant to order of the Court on motion to reopen the case for additional evidence, a stipulation of additional facts was filed on November 6, 1933. [R. 42-64.] Thereafter on November 17, 1933, appellant filed a motion in arrest of judgment, which was denied by the Court. [R. 64-67.] Appellant filed requests for special findings of fact and conclusions of law, which were rejected by the Court. [R. 67-69, 75.] The Court accepted and adopted the findings and conclusions of law requested by appellee. [R. 70-75.] The Court determined that the Commissioner had erred in refusing to allow to appellee deductions from income for the fiscal year ended May 31, 1922, in the amount of $12,022.93 for further depletion on wells; and in the amount of $68,461.16 for British income taxes, and in levying tax assessments on the basis of net income computed without the allowance of said deductions. [R. 74.] On this basis, the Court rendered judgment for the appellee for $11,451.60, with interest as provided by law. [R. 26-27.] From this judgment for appellee, the appellant has appealed. [R. 81.]

PRELIMINARY STATEMENT.

At the trial below, six associated cases were consolidated for trial, all being suits against present or former collectors of internal revenue for income or income and profits taxes alleged to have been erroneously collected. In each of these cases, judgment was entered by the Court in favor of the taxpayer, and all, upon appeal, have been set for argument together before this Court. Following is a list of these cases, showing the Docket No. in this Court, the names of the parties, and the fiscal year involved.

Docket No.	Taxpayer (Appellee)	Collector (Appellant)	Fiscal Year Ended May 31
7488	The St. Helens Petroleum Co., Ltd.	Galen H. Welch	1921
7490	" " " " "	" "	1922
7493	" " " " "	Rex B. Goodcell	1922
7491	The Kern River Oilfields of Cal., Ltd.	" " "	1923
7492	" " " " "	" " "	1924
7489	" " " " "	" " "	1925

Dockets 7490 and 7493 involved the same taxpayer, the same taxable year, and the same issues, with separate suits being brought and separate judgments being rendered against two successive collectors of internal revenue because a part of the tax in controversy was paid to each of them.

The issue involving the deductibility of British income taxes is involved in *all* of these cases and was the only issue presented by the parties at the trial below, the other issues raised by the pleadings having been conceded by appellants in the stipulations filed at the trial [R. 41.]

The other issue, involved only in Docket Nos. 7488, 7490, and 7493, is the jurisdiction of the trial court to enter judgment in any case where the profits taxes have

been determined under Section 328, Revenue Acts of 1918 and 1921. As Congress did not impose any profits tax for any period after December 31, 1921, this issue naturally is not presented in Docket Nos. 7489, 7491 and 7492.

Appellants have presented their full arguments on both issues in the brief filed in Docket No. 7488, and have merely referred to said brief in the briefs presented in all other cases. As a matter of convenience and to avoid confusion, the same procedure is being followed by appellees. Accordingly the full statement of argument on both issues will be presented in the brief filed under Docket No. 7488.

SUMMARY OF ARGUMENT.

Issue I. The Court below did not err in denying appellant's motion in arrest of judgment. Neither in the pleadings nor at the trial of the case was any issue raised as to jurisdiction of the Court or as to the propriety of the Court redetermining the profits tax on the basis of the rates previously determined by the Commissioner. Appellant conceded at the trial that the taxable net income of appellee had been overstated in the amount of $12,022.93 because of insufficient allowance for depreciation deductions, and submitted to the Court for determination the propriety of an additional deduction of $68,461.16 for taxes, which issue was decided by the Court in favor of appellant. In the absence of any allegation or proof to the contrary, the Court was justified in applying to the correct net income the profits tax rates previously determined by the Commissioner. The Court has not attempted to override the discretionary powers of the Commissioner.

None of the authorities cited by appellant support his position and, on the contrary, the Supreme Court has in three cases affirmed, either in whole or in part, decisions of lower courts allowing refunds to taxpayers whose profits taxes had been determined under "special assessment."

Congress has not given the Commissioner unreviewable discretion where errors were admittedly made in the determination of net income, even though the profits taxes are computed under Section 328. This is particularly so in the case of foreign corporations to whose returns "special assessment" was required by law and not granted as a matter of relief.

Even if the Commissioner's computation of the *profits tax* was not subject to review by the Court, such inhibition would not apply to the redetermination of the *income tax,* where the exact rate was provided in the law and was not a matter of discretion.

Under appellant's construction, the law would be of doubtful constitutionality. Since appellee's profits taxes had to be determined under "special assessment," it would follow under appellant's contentions that it could *never* obtain a judicial review of the Commissioner's determination of either its income or its profits tax, no matter how arbitrary or erroneous the basis. This would not only violate the due process clause of the Constitution, but would also amount to a delegation of legislative and judicial functions to the executive branch. The interpretation of the law adopted by the Court below avoids these constitutional difficulties and carries out the clear intention of Congress to provide a complete system of judicial review to taxpayers.

It should be noted that no profits taxes were determined by the Commissioner for the last five months of the fiscal year in question. [R. 62.] Accordingly, there can in no event be any question of discretion or jurisdiction with respect to the income tax assessed and paid for that portion of the fiscal year.

Issue II. Under the Federal Revenue Act of 1921, the deduction for taxes (including income taxes paid to a foreign Government) is allowable to the one on whom the taxes were imposed and by whom they were paid. It has been stipulated and found by the Court that the British income tax of $68,461.16, in issue here, was paid to the British Government by the appellee. [R. 34.] It is clear that, under British law, this tax was imposed on appellee, was determined on the basis of its net income, and was payable in any event, even though no dividends might ever be declared to its shareholders.

There is no British income tax on dividends as such. In paying the British income tax, appellee did so as a taxpayer and not as an agent for its shareholders. The mere fact that it was permitted, though not required, under the British practice, to deduct from dividends paid, if any, a proportionate amount of the tax, does not change the fact that it paid the taxes on its own behalf as a taxpayer. Such deductions from dividends did not result in any reimbursement to appellee of its own income tax payment; having paid the tax, its income available for dividends was merely the lesser sum.

To speak of the payment of the income tax by appellee as a "withholding" is simply a misnomer contrary to facts. It was required to pay the tax to the British Government on *its* entire net income even though (1) it made no payment whatever to its stockholders and (2) the stockholders had no income from this or any other source.

The construction contended for by appellant would result in confusion in the administration of our tax laws and often would result in an unfair and unjust duplication of deductions, defeating the collection of tax revenues.

The statute is plain and unambiguous, leaving no need for departmental construction. There has been no uniform and long continued rule of construction by the courts, the Board or the Treasury Department. The informal Bureau rulings relied upon by appellant "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." As a matter of fact, the Bureau's views on this question have changed from time to time. At the present time the Department is contending in various cases before the Board precisely in accordance with appellee's contentions herein.

ARGUMENT.

The detailed argument of appellee on both questions is set forth in the brief filed for appellee in the case of *Welch v. St. Helens Petroleum Co., Ltd.,* No. 7488, now pending before this Court, which is included herein by reference.

CONCLUSION.

Appellee submits that for the reasons set forth above the Court below properly assumed jurisdiction of the subject-matter and properly held that appellee was entitled to a deduction of $68,461.16 on its return for the fiscal year ended May 31, 1922, on account of income taxes paid during said year to the Government of Great Britain.

Respectfully submitted,

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Appellee.

GEORGE M. WOLCOTT,
DONALD V. HUNTER,
922 Southern Bldg.,
Washington, D. C.
Of Counsel.

No.

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER WOODALL,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

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VOLNEY P. MOONEY, JR., Esq.,

SYLVESTER HOFFMANN, Esq.,

Chester Williams Building,
Los Angeles, California.

United States of America, ss.

To WALTER WOODALL and VOLNEY P. MOONEY, JR., and SYLVESTER HOFFMANN, his Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 6th day of Nov, A. D. 1933, pursuant to Order Allowing Appeal filed October 7th, 1933, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entiled Walter Woodall vs United States of America, No. 4247-M wherein the United States of America is defendant and appellant and you are plaintiff and appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 7th day of October, A. D. 1933, and of the Independence of the United States, the one hundred and fifty-eighth

Paul J McCormick

U. S. District Judge for the Southern District of California.

Receipt is acknowledged of a copy of the within Citation, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein.

Dated: October 7 1933.

Volney P. Mooney Jr.

.....

Attorneys for Plaintiff

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit Walter Woodall, Plaintiff and Appellee, vs. United States of America, Defendant and Appellant. CITATION Filed Oct 9-1933 R. S. Zimmerman, Clerk By L Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,)

Plaintiff, (

-vs.-) COMPLAINT—WAR RISK INSURANCE

UNITED STATES OF AMERICA, (

Defendant.)

Comes now the plaintiff and for his cause of action against this defendant complains and alleges as follows:

I

That plaintiff is a citizen of the United States of America and a resident of the Southern District and State of California and of the County of Los Angeles therein.

II

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy of insurance issued under and by virtue of said acts to the plaintiff by the defendant.

III

That on the 31st day of December, 1917, plaintiff enlisted in the armed forces of defendant herein, and that he served in said armed forces from said date up to and including the 11th day of September, 1919, when he was honorably discharged from said service, and that during all of said time he was employed exclusively in the active service of defendant herein.

IV

That during the month of January, 1918, and while this plaintiff was in said active service and employment of and for defendant herein, plaintiff made application for and was granted insurance in the sum of Five Thousand Dollars ($5,000.00), by defendant, who thereafter issued to plaintiff its certificate of his compliance of said acts. That plaintiff paid all premiums promptly when the same became due on said policy of insurance, and that plaintiff has in all ways and respects complied with the legal requirements and duties on his part to be performed. That plaintiff paid all premiums on said policy of insurance from the date of the issuance thereto of same, to-wit: the month of January, 1918, up to and including the month of December, 1919.

V

That while serving the defendant as aforesaid and prior to the date of the honorable discharge of plaintiff as aforesaid mentioned, plaintiff herein contracted certain dis-

eases, injuries and disabilities resulting in and known as pulmonary tuberculosis, gall bladder disabilities and other disabilities.

VI

That under the provisions of the said Act and other Acts amendatory thereof, hereinbefore described under and by virtue of the terms of the policy of insurance issued by defendant herein to plaintiff, plaintiff is entitled to the payment of the sum of $28.75 for each and every month that he may be permanently and totally disabled.

VII

That said diseases, injuries and disabilities have continuously since the month of November, 1919, rendered and still do render plaintiff herein wholly unable to follow continuously any substantially gainful occupation and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in the same or greater degree so as to prevent him from following continuously any substantially gainful occupation. That plaintiff has been ever since the month of November, 1919, and still is totally and permanently disabled by reason of and as a direct and proximate result of such disabilities above set forth.

VIII

That plaintiff has made application to the defendant, through its Veterans Bureau and the director thereof, for

the payment of said insurance for total and permanent disability, and that said Veterans Bureau and the director thereof has refused to pay plaintiff said insurance, and on October 3rd, 1930, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to same.

IX

That because of the foregoing, plaintiff is entitled to the payment of $28.75 for each and every month since November, 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled, this in accordance and pursuant to the terms of the aforesaid policy of insurance.

X

That plaintiff has employed the services of Volney P. Mooney, Jr., an attorney and counselor at law, duly licensed and admitted to practice before this Court and all of the Courts of the State of California; that reasonable attorney's fees to be allowed to plaintiff's attorney for his services in this action is Ten percentum (10%) of the amount of insurance recovered, and to be paid by the defendant out of the payments to be made under the judgment or decree payable at a rate not exceeding one-tenth (1/10) of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

WHEREFORE, plaintiff prays judgment as follows:

1. That plaintiff since November, 1919, has been and still is totally and permanently disabled and unable to follow continuously any substantially gainful occupation and that it is reasonably certain that this condition will exist throughout plaintiff's lifetime.

2. That plaintiff have judgment against the defendant for all of the monthly installments of $28.75 per month, for each and every month from the aforesaid month of November, 1919, and continuously thereafter so long as he lives and remains totally and permanently disabled.

3. Determining and allowing to plaintiff's attorney a reasonable attorney's fees in the amount of Ten percentum (10%) of the amount of insurance recovered, and to be paid by the defendants out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth (1/10) of each of said payments in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

4. For such other and further relief as may be just and equitable in the premises.

Volney P. Mooney Jr.
VOLNEY P. MOONEY, Jr.
Attorney for Plaintiff.

STATE OF Tennessee)
) ss.
COUNTY OF Washington)

WALTER WOODALL, being by me first duly sworn, deposes and says: That he is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Walter Woodall

Subscribed and sworn to before me this 22nd day of October, 1930.

[Seal] L J Kirkpatrick

Notary Public in and for the County of Washington, State of Tennessee

My Commission expires Jan 15, 1933

[Endorsed] No. 4247-M United States District Court Southern District of California Central Division Walter Woodall Plaintiff vs. United States of America, Defendant COMPLAINT—WAR RISK INSURANCE Filed Nov 5 1930 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk Volney P. Mooney, Jr. Atty. at law 818 Chester Williams Bldg. Los Angeles—MUtual 8208

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	No. 4247-M
vs.	)	
	)	ANSWER
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

COMES NOW the defendant, United States of America, by its attorneys, Samuel W. McNabb, United States Attorney for the Southern District of California, Dorothy Lenroot Bromberg, Assistant United States Attorney for said district, and H. C. Veit, Regional Attorney for the Veterans Bureau, of counsel, and for answer to the complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

Answering Paragraphs I and X of the plaintiff's complaint, this defendant has no information or belief sufficient to enable it to answer the allegations of said Paragraphs I and X of the plaintiff's complaint herein and on that ground denies each and every allegation therein set forth.

II.

The defendant admits the allegations of Paragraphs II, III, IV and VIII of plaintiff's complaint.

III.

This defendant denies the allegations of Paragraphs V, VI, VII and IX of the plaintiff's complaint.

WHEREFORE, defendant prays that the complaint be dismissed, and that there be judgment for the defendant for its costs of suit incurred herein, and for such other and further relief as may seem meet and proper to the Court in the premises.

DATED this 25th day of February, 1931.

Samuel W. McNabb
SAMUEL W. McNABB,
UNITED STATES ATTORNEY.

Dorothy Lenroot Bromberg
DOROTHY LENROOT BROMBERG,
Assistant U. S. Attorney.

H. C. Veit -
H. C. VEIT,
Regional Attorney for the Veterans Bureau, Of Counsel,

Attorneys for Defendant.

[Endorsed]: No. 4247-M In the District Court of the United States for the Southern District of California, Central Division. Walter Woodall, Plaintiff, vs. United States of America, Defendant. ANSWER Received copy of within Answer this 25 day of Feb, 1931 Volney P. Mooney, Jr. Attorney for Plaintiff Filed Feb 25 1931 R. S. Zimmerman, Clerk By M L Gaines Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4247-M
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION WAIVING JURY

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, that trial by jury in this case is expressly waived and that the trial may be by the Court without a jury.

Dated: March 14 1933.

John R. Layng
JOHN R. LAYNG
United States Attorney

Lewis M. Andrews
LEWIS M. ANDREWS
Asst. United States Attorney

Attorneys for Defendant.

Volney P Mooney, Jr
VOLNEY P. MOONEY, JR.,
Sylvester Hoffmann
SYLVESTER HOFFM*AN*,
Attorneys for Plaintiff.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff, vs. United States of America, Defendant. STIPULATION WAIVING JURY Filed Mar 16 1933 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 31st day of May in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Walter Woodall, Plaintiff,	)	
vs	)	No. 4247-M-Cr.
United States of America, Defendant.	)	

This cause coming on for trial; Sylvester Hoffman, Esq., appearing for the plaintiff; Clyde Thomas, Esq., Assistant United States Attorney, appearing for the Government; R. F. Purdue being present as official court reporter;

Both sides answering ready at the hour of 10:05 a. m., it is ordered that trial proceed; whereupon, Attorney Hoffman makes statement of the plaintiff's case, and

Ray E. DeSpain is called, sworn and testifies on direct examination by Attorney Hoffman, and on cross-examination by Attorney Thomas.

John F. Newsbaum is called, sworn and testifies on direct examination by Attorney Hoffman, and on cross-examination by Attorney Thomas.

Walter Woodall is called, sworn and testifies on direct examination by Attorney Hoffman, and on cross-examination by Attorney Thomas.

At the hour of 12 noon, recess is declared; and court reconvening at 2 p. m., all present as before, it is ordered that trial proceed; whereupon,

Marvel Beem is called, sworn and testifies on direct examination by Attorney Hoffman, and on cross-examination by Attorney Thomas.

Harry Cohn is called, sworn and testifies on direct examination by Attorney Hoffman, and on cross-examination by Attorney Thomas.

Walter Woodall resumes the stand and testifies further on cross-examination by Attorney Thomas; and thereupon certain depositions are offered and stipulated to have been deemed read in evidence; and the following exhibit is offered and admitted in evidence, to-wit:

Plaintiff's Ex. 1: Copy of Service Record (Transcript)

Harrison M. Hawkins is called, sworn and testifies for the plaintiff on direct examination by Attorney Hoffman and on cross-examination by Attorney Thomas, and in connection with this testimony the following exhibits are offered and admitted in evidence, to-wit:

Plaintiff's Ex. 2:	Copy of Medical Record.	
" Ex. 3:	Copy of Service Record.	
" Ex. 4:	Transcript of Work Record.	
" Ex. 5:	Report of Physical Examination dated	8/30/20.
" Ex. 6:	Letter, dated 8/30/20.	
" Ex. 7:	Report of Physical Examination dated	1/20/21.
" Ex. 8:	" " " " "	7/11/21.
" Ex. 9:	" " " " "	7/18/21.
" Ex. 10:	" " " " "	11/17/21.
" Ex. 11:	" " " " "	3/14/22.
" Ex. 12:	" " " " "	4/15/22.
" Ex. 13:	" " " " "	10/30/22.
" Ex. 14:	" " " " "	4/10/23.
" Ex. 15:	" " " " "	4/10/23.
" Ex. 16:	" " " " "	8/30/23.
" Ex. 17:	" " " " "	9/21/23.
" Ex. 18:	" " " " "	1/6/28.
" Ex. 19:	" " " " "	2/14/28.
" Ex. 20:	" " " " "	1/10/29.
" Ex. 21:	" " " " "	7/8/27.
" Ex. 22:	" " " " "	

At 4 o'clock p. m. the plaintiff rests; whereupon, Attorney Thomas moves for non-suit, which is denied without prejudice.

Elliott P. Smart is called, sworn and testifies on direct examination by Attorney Thomas and on cross-examination by Attorney Hoffman.

Oscar S. Essenson is called, sworn and testifies on direct examination by Attorney Thomas and on cross-examination by Attorney Hoffman.

Frank L. Long is called, sworn and testifies on direct examination by Attorney Thomas and on cross-examination by Attorney Hoffman.

Frederick F. DuPree is called, sworn and testifies on direct examination by Attorney Thomas; and in connection therewith the following exhibit is offered and admitted in evidence, to-wit:

Defendant's Ex. A: Application dated 8/30/20.

At 4:40 o'clock p. m., the defendant and plaintiff resting;

It is ordered that this cause stand submitted for decision on briefs to be filed; plaintiff's brief to be filed by June 6, 1933, and U. S. brief five days thereafter; it is further ordered that original exhibits may be withdrawn and photostatic copies substituted therefor.

At a stated term, to wit: The February Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Friday, the 30th day of June, in the year of our Lord one thousand nine hundred and thirty-three.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Walter Woodall, Plaintiff,	)	
vs.	)	No. 4247-M-Law
United States of America, Defendant.	)	

Findings and judgment are ordered for the plaintiff and against the defendant pursuant to the prayer of plaintiffs COMPlaint and in accordance with written Memorandum of Conclusions of the Court filed herein this day.

Messrs. Volney P. Mooney, Jr., and Sylvester Hoffman are allowed ten per cent of the amount of recovery by plaintiff as attorneys' fees herein. Exceptions noted and allowed to defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

— — — — —

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4247-M
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM OF CONCLUSIONS OF THE COURT.

McCORMICK, District Judge:

Action on War Risk Insurance Certificate in force by payment of premiums until October 11, 1919. It is admitted that the plaintiff has been totally and permanently disabled since March 9, 1928. The record evidence from the Government file of this veteran clearly shows that he had active pulmonary tuberculosis of chronic stage as early as November 17, 1921, and in the light of the evidence as to his other disabilities and exposure encountered while in service, it is a fair inference to deduce that he was afflicted with active tuberculosis during the life of the policy to such an extent as to reasonably make it unsafe and dangerous for him to thereafter perform

any gainful work. It is clear that the disease and disability were brought about by the unsanitary condition and exposure that plaintiff underwent in Naval service of the United States in the North Seas during the World War period. The record shows that he tried to work but could do so only spasmodically and for brief periods. He has been entirely unable to do any work for the last six or seven years because of his tubercular condition that has been aggravated by other physical disabilities.

Under these circumstances, he is entitled to a finding that he has been totally and permanently disabled within the terms of the Insurance Certificate and applicable statutes and decisions of the Federal Courts from as early as August, 1919. The case of Falbo vs. United States, C. C. A. 9, decided May 1, 1933, is not analogous. There the veteran was employed for more than two years at regular wages and was able to do the usual work of loading lumber and working in a match factory and sawmill. I think Judge Sawtelle's observations in his dissenting opinion are more nearly applicable to the facts in this case than is the majority opinion in the Falbo case. See also United States vs. Francis, C. C. A. 9, 64 Fed. 2nd., 865; United States vs. Berleson, C. C. A. 9, 64 Fed. 2nd., 867.

Findings and judgment accordingly for plaintiff with ten per cent allowance to Messrs. Mooney and Hoffman as attorneys' fees.

Dated at Los Angeles, California

June 30, 1933

[Endorsed]: Filed Jun 30 1933 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

— — — — —

WALTER WOODALL,	)	
	)	
Plaintiff,	)	No. 4247-M
	)	
vs.	)	FINDINGS OF
	)	FACT
UNITED STATES OF AMERICA,	)	and
	)	CONCLUSIONS
Defendant.	)	OF LAW

This matter came on regularly for trial on the 31st day of May, 1933, before the undersigned, one of the Judges of the above-entitled Court, trial by jury having been waived in writing by both the parties, the plaintiff appearing personally and by Volney P. Mooney, Jr., Esq., his attorney, and Sylvester Hoffmann, Esq., of Counsel, and the defendant appearing by Peirson M. Hall, Esq., United States Attorney for the Southern District of California, and by Clyde Thomas, Esq., Assistant United States Attorney for the aforesaid district; and evidence, both oral and documentary, having been introduced, and the cause having heretofore been submitted to the Court for its decision, the Court being fully informed in the premises and having considered the law and the evidence, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

1. That it is true that the plaintiff, Walter Woodall, is a citizen of the United States of America, and at the time of the commencement of this action was, and now is a resident of the Southern District and the State of California and of the County of Los Angeles therein.

2. That it is true that this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy of insurance issued under and by virtue of said acts to the plaintiff by the defendant.

3. That it is true that the plaintiff, Walter Woodall, enlisted in the armed forces of the defendant herein, to-wit: the United States of America, on the 31st day of December, 1917, and that he served in said armed forces from said date up to and including the 11th day of September, 1919, when he was honorably discharged from said service, and that during all of said time he was employed exclusively in the active service of defendant herein.

4. That it is true that during the month of January, 1918, and while this plaintiff was in said active service and employment of and for defendant herein, plaintiff made application for and was granted insurance in the sum of Five Thousand Dollars ($5,000.00), by defendant, who thereafter issued to plaintiff its certificate of his compliance of said acts. That plaintiff paid all premiums promptly when the same became due on said policy of insurance, and that plaintiff has in all ways and respects complied with the legal requirements and duties

on his part to be performed. That plaintiff paid all premiums on said policy of insurance from the date of the issuance thereto of same, to-wit: the month of January, 1918, up to and including the month of December, 1919.

5. That it is true that while serving the defendant as aforesaid and prior to the date of the honorable discharge of plaintiff as aforesaid mentioned, plaintiff herein contracted certain diseases, injuries and disabilities resulting in and known as pulmonary tuberculosis, gall bladder disabilities and other disabilities.

6. That it is true that under the provisions of the said Act and other Acts amendatory thereof, hereinbefore described and under and by virtue of the terms of the policy of insurance issued by defendant herein to plaintiff, plaintiff is entitled to the payment of the sum of $28.75 for each and every month that he may be permanently and totally disabled.

7. That it is true that said diseases, injuries and disabilities, have continuously since the month of November, 1919, rendered and still do render plaintiff, Walter Woodall, wholly unable to follow continuously any substantially gainful occupation; that such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in the same or greater degree so as to prevent him from following continuously any substantially gainful occupation. That plaintiff has been ever since the month of November, 1919, and still is totally and permanently disabled by reason of and as a direct and proximate result of such disabilities above set forth.

8. That the above-named plaintiff filed suit against the United States of America in the aforesaid District Court of the United States to recover the benefits under his aforesaid war risk term insurance contract.

9. That it is true that the plaintiff made application to the defendant, prior to the commencement of this action, through its Veterans Bureau and the director thereof, for the payment of said insurance for total and permanent disability, and that said Veterans Bureau and the director thereof has refused to pay plaintiff said insurance, and on October 3rd, 1930, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same.

10. That it is true that the plaintiff herein is represented by Volney P. Mooney, Jr., Esq., and the defendant. United States of America, is represented by Peirson M. Hall, Esq., United States Attorney in and for the Southern District of California.

11. That it is true that the aforesaid policy of war risk term insurance was in full force and effect during the month of November, 1919, the date upon which the plaintiff was and became and ever since has been permanently and totally disabled for insurance purposes.

12. That it is true that plaintiff has employed the services of Volney P. Mooney, Jr., Esq., attorney and counsellor at law, duly licensed and admitted to practice before this Court and all of the Courts of the State of

California; that reasonable attorney's fees to be allowed to plaintiff's attorney for his services in this action is Ten percentum (10%) of the amount of insurance recovered, and to be paid by the defendant out of the payments to be made under the judgment or decree payable at a rate not exceeding one-tenth (1/10) of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

CONCLUSIONS OF LAW

From the above findings of fact the Court makes the following Conclusions of Law:

1. That the insured, to-wit: the plaintiff, Walter Woodall, became permanently and totally disabled during the month of November, 1919, and while said $5,000.00 policy of war risk term insurance was in full force and effect, and that at all times from and after said month of November, 1919, the plaintiff was, ever since has been and now is totally and permanently disabled.

2. That the plaintiff herein is entitled to recovery from the defendant, United States of America, in accordance with the said war risk term insurance contract and the laws applicable thereto, monthly installments in the sum of $28.75 each for each and every month commencing with the month of November, 1919, and continuously thereafter as long as he lives and continues to be permanently and totally disabled.

3. That Volney P. Mooney, Jr. Esq., attorney for plaintiff herein, be allowed for his services in this action ten percentum (10%) of the amount of insurance recovered as aforesaid, and to be paid by the defendant, United States, out of the payments to be made under the judgment or decree herein, at a rate of one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

Dated: July 7th, 1933.

Paul J McCormick
U. S. District Judge

Approved as to form as provided by Rule 44.

PEIRSON M. HALL,
U. S. Attorney

M G Gallaher
Assistant U. S. Attorney

[Endorsed]: No. 4247-M In the United States District Court in and for the Southern District of California Central Division Walter Woodall Plaintiff, vs. United States of America Defendant. FINDINGS OF FACT AND CONCLUSIONS OF LAW. Filed Jul 7-1933 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk. Volney P. Mooney, Jr. Attorney at Law 818 Chester Williams Building 215 West Fifth Street Los Angeles Phone MUtual 8208 Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

— — — — —

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	No. 4247-M
vs.	)	
	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

The above-entitled cause having come on regularly for trial the 31st day of May, 1933, before the undersigned, one of the Judges of the above-entitled Court, sitting without a jury, trial by jury having been waived in writing by both plaintiff and defendant; plaintiff appearing in person and by his attorney, Volney P. Mooney, Jr. and Sylvester Hoffmann of Counsel for plaintiff, and the defendant, United States of America, appearing by Peirson M. Hall, United States Attorney, and Clyde Thomas, Assistant U. S. Attorney, for the above district, and the evidence, both oral and documentary, having been introduced, and the case submitted to the Court for decision, and the Court heretofore having made and caused to be filed here-

in its written Findings of Fact and Conclusions of Law, and being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Walter Woodall, recover from the defendant, the United States of America, benefits in accordance with the terms of his war risk term insurance contract, at the rate of $28.75 per month from and after the month of November, 1919, and continuously thereafter at such rate so long as the plaintiff may live and remain and continue to be totally and permanently disabled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Volney P. Mooney, Jr. is entitled to receive from said judgment and payments, as a reasonable attorney's fee for his services as attorney for the plaintiff in the above-entitled case, ten percentum (10%) of the amount of any and all monies due to the plaintiff in accordance herewith, and that he is entitled to the further sum of ten percentum (10%) of each and every payment other than the sum found to be due hereunder, hereinafter made by the defendant to the plaintiff, his heirs, executors, administrators, assigns, or any other person, in consequence of or as the result of the entry of this judgment, said payments, however, to be made as by law in such cases provided.

Done this 7th day of July, 1933.

Paul J McCormick
United States District Judge.

Approved as to form as provided in Rule 44

PEIRSON M. HALL,
United States Attorney.

M G Gallaher
Assistant U. S. Attorney

Judgment entered and recorded JUL 7-1933.

R. S. ZIMMERMAN
Clerk.

By B B Hansen
Deputy Clerk.

[Endorsed]: No. 4247-M In the United States District Court in and for the Southern District of California Central Division Walter Woodall Plaintiff vs. United States of America Defendant JUDGMENT Filed Jul 7-1933 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk Volney P. Mooney, Jr. Attorney at Law 818 Chester Williams Building 215 West Fifth Street Los Angeles Phone MUtual 8208 Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4247-M
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

BILL OF EXCEPTIONS

Be it remembered that the above entitled cause came on for trial in the United States District Court for the Southern District of California at Los Angeles on May 31, 1933 before the Honorable Paul J. McCormick, United States District Judge, without a jury, at which time the plaintiff was represented by Messrs. Mooney & Hoffman of Los Angeles, California, and the defendant, the United States of America, by Clyde Thomas, Esq., Assistant United States Attorney in and for the Southern District of California.

At the onset of the trial the following facts were established:

That Walter Woodall enlisted in the service of the United States on December 31, 1917 and he was discharged therefrom on September 11, 1919; that he applied for and was granted a contract of war risk term insur-

(Testimony of Ray Earl DeSpain)

ance during the month of January, 1918 in the sum of $5,000; that premiums were paid thereon up to and including the month of December, 1919 which, with the grace period of thirty-one days, finally lapsed the contract at midnight January 31, 1920. It was also admitted on behalf of the government that the said Walter Woodall was and has been at all times since March 20, 1928 totally and permanently disabled. It was the contention of the plaintiff that he became totally and permanently disabled some time prior to midnight January 31, 1920. Thereafter the following proceedings took place:

RAY EARL DESPAIN,

a witness called on behalf of the plaintiff, testified substantially as follows:

That he identified the plaintiff, Walter Woodall, sitting at the counsel table, and that he had known the said Walter Woodall since 1922 or thereabouts; that he met Woodall while he was in vocational training with the John R. Paul Undertaking Company of Los Angeles, California, at which place the witness then occupied the position as head man and embalmer. Witness stated that Mr. Woodall was with the Company possibly six or eight weeks; that he was there part of the time and was sick part of the time; that he did not appear to be a well man and that at the suggestion of the witness Woodall was discharged because he could not "stand the work, the fumes made him cough and sick. He couldn't seem to do the work."

(Testimony of Ray Earl DeSpain)

CROSS EXAMINATION

On cross examination the witness stated that he was not sure whether it was in December 1922 or in January of 1923 as he could not remember and had no records; stated that Woodall seemed to be sick and coughing and stated he was a sick man; that he appeared to be trying to work; did not particularly complain of pain but was nauseated; did not complain of any particular disease. Witness expressed an opinion that he thought Woodall had lung or stomach trouble; that his appearance at the time of trial suggested that he was somewhat thinner than at the time he was in vocational training; that while in training he was pale, had a sort of yellowish color, was coughing and gagged easily; said that the plaintiff never complained to him of any lung trouble or tuberculosis; that he believed he asked the plaintiff if he had tuberculosis; did not remember whether the doctor had ever treated the plaintiff, or that he had asked the plaintiff if a doctor had treated him. Witness further answered that he did not tell the vocational training man that Woodall should be withdrawn from training but he did tell Woodall that he thought he should go to a doctor; did not remember what Woodall said or did, nor did he remember what, if any, pay he received while with the company.

(Testimony of John F. Newsbaum)

JOHN F. NEWSBAUM,

a witness called on behalf of the plaintiff, testified substantially as follows:

That from April, 1918 to sometime in August, 1919 he was a chief yeoman in the United States Navy on board the U.S.S. ROANOKE, his duty being in charge of the payrolls; that the ROANOKE was a converted freight steamer used in laying mines; that the ship was in that service from May, 1918 until the fall at the time of the Armistice; that they were laying mines in the North Sea; that the sleeping quarters on the ROANOKE for the officers were on the top deck and on the next deck below the crew had their sleeping quarters, these being on the second and third decks; that the ventilation of these decks was obtained through ventilators coming through the top side; that he had observed the ventilating of these quarters and that it was very poor; that members of the black gang, men who worked in the boiler room, slept on the second and third decks, and that when the mines came aboard they were stored on all decks below the first deck; that when the mines were not aboard there was ample room for the crew but when the mines were abord the crew had to sleep where they could find room, and that, due to the crowded condition, the crew had to sling their hammocks over the mines or any vacant space; testified that the vessel used soft coal which was loaded on the boat by means of canvas sacks which were then emptied

down chutes by way of the bunkers; that there was only one instance when the mine layers laid a smoke screen; said that the black gang worked in shifts; that when the mines were laid all the men had duties to perform, that is, after they were off their regular shifts; that he remembered Walter Woodall as a member of this crew; that Woodall was a fireman; that he was not closely or personally acquainted with him at that time other than seeing him; that he saw men coming up out of the fire room; that they generally wore dungarees, were stripped to the waist and they were covered with perspiration; they were not any different from a stoker that would come out of a hole in a Transpacific ship; that the witness ate at a separate mess from the rest of the crew but had the same food; testified further that when the ship would return from a mine-laying operation to Scotland they started coaling and taking on mines for the next trip; sometimes we would leave right away; the longest period that we layed in port was about 30 days between trips, which was unusual; that the ROANOKE averaged almost two trips a month; that when they came in it would take a day and night possibly to coal; testified that the mines with the anchor and chain would weigh about 1,400 lbs. apiece; testified that the stokers and firemen assisted at coaling and loading the ship. The boats crew consisted of 400 enlisted men and 20 to 25 officers.

CROSS EXAMINATION

On cross examination the witness stated that it would take about thirty-six hours from port to the mine fields where they unloaded and placed the mines, and that a

(Testimony of John F. Newsbaum)

round trip would take about three or four days; that they averaged about two trips a month making about twelve trips in all; stated that ventilation to the quarters came down the hatches and ventilators; that in port it was possible to open the port-holes in the daytime; that there was also a forced draft ventilation system blowing air into a part of the quarters. At night time the lights were not on while out at sea and they were not able to open the port-holes and all the ventilation came down from the hatches and ventilators; that when they would be in port the men not on shift generally went ashore from about 4 in the afternoon until 10 at night; stated the ROANOKE was about 300 feet long and 25 feet beam; that each man in the crew slept in a hammock; that it was somewhat crowded when the mines were aboard but there was plenty of room when they were not there, and the only time there was a tendency to crowd was when the mines were on the ship and that crowded condition would exist for the thirty-six hours they were going out, and when we had mines aboard; there was very little time we didn't have mines aboard.

RE-DIRECT EXAMINATION

He stated that after the Armistice the ship went to England for about two weeks, returned to Norfolk to have the mines unloaded then went to New Hampshire to be fitted up as a transport to bring the troops back from Europe; left Boston early in March to bring back troops and made four trips; that the speed of the vessel was 10 to 11 knots depending upon weather conditions. Witness also states that Captain V. D. Dunlap was Squadron Commander of the mine-laying squadron.

(Testimony of Walter Woodall)

RE-CROSS EXAMINATION

Witness stated that at times the ROANOKE was a troop ship they carried approximately 1,500 troops and a crew of 200.

WALTER WOODALL,

the plaintiff in the case, took the stand and testified substantially as follows:

That when he enlisted in the United States Navy on December 31, 1917 he was 33 years old and at the trial his age was 47; that before he entered the service he follow*ing* stationary fireman firing boilers and followed mining, public works usually, at prevailing wages; that he made $6.00 or $7.00 per day mining; that he entered the service as a coal passer; that he had lost no time from illness or sickness prior to the war; that he was on the ROANOKE in the North Sea laying mines; that he passed the coal from the bunkers to the firemen, but helped the firemen occasionally to clean up the ashes and sift them out; that later he was promoted to second class fireman that conditions in the fireroom were very comfortable while in port but extremely hot when at sea; that they had a ventilator in the fireroom and the ventilation came down from the first deck but there was no ventilation in the bunkers where the air was dense; that they used so*a*ft coal and the handling of the coal made air conditions disagreeable; that when coaling the ship they would pour the coal in from the top deck and they would work in 20 minute shifts; that when firing the boilers at sea they would work four hours continually and 8 hours off; that if they were firing when laying mines they would keep on

(Testimony of Walter Woodall)

firing until they finished; that he at one time worked 14 hours on one shift firing a boiler; that it was extremely hot; working on the fires you can only get air through one ventilator; and that he was stripped to the waist and would stand under the ventilator to cool off; that the air coming down the ventilator was very cold; that he once fell out with over-heat and they poured water over him; they then put him in charge of the evaporators, the apparatus used to make fresh water out of salt water; that he got colds and had stomach trouble with pains; would get tired and cough; stated that he appeared on sick call at the sick bay; witness testified that he slept on the 3rd deck; that the ventilation was poor, especially at sea the port-holes being closed; that the air came down through a ventilating system, forced; that hammocks were about three feet apart; that he could hang his hammock up every night even when the mines were aboard.

The witness stated he was discharged on September 11, 1919; that he still had a tired feeling and cough; that the colds stayed with him all the time; had pains in his stomach; that his right side was sore; that he would be constipated and had diarrhoea and sour belches; that when he had charge of the evaporators he had to keep the steam gauge properly regulated; had to clean out the evaporators about every other shift and chip out the salt from around the coils; that this work was very much easier than coal passing; that when he was discharged he had his clothes on as well as he could remember; that he wanted to be discharged awfully bad; that as he walked by the doctors asked if he felt alright and he stated that he did; states that he was discharged in New York, went

home to Alabama, and went to see Dr. Evans; that Dr. Evans gave him medicine and treatments for quite a while; still had at that time pains in his stomach, soreness on right side and tired feeling, and pains in the chest and coughing.

Witness testified that after he saw Dr. Evans he want to work in the oil fields in Louisiana firing a stationary boiler with oil, which was different from firing with coal; that all he had to do was regulate the oil and water; that he made $4.00 to $4.50 per day; that he worked about six weeks, eight hours a day; did not remember how many days a week but that if he felt bad he would lay off and someone else would work a double shift for him; stated he got sick and went back to see Dr. Hodges; had a bad stomach and pain in his right side; was tired and was coughing, with pains in his chest. In the spring of 1920 he saw Dr. Hodges quite often and got medicine, and then he was operated on for gall bladder, after which Dr. Hodges dressed his side several times; that the operation took place June 24, 1920, at Chattanooga, Tennessee, Dr. George R. West being the operator; that after the operation he went back home and Dr. Hodges treated him for some time, and that he then went to Birmingham, Alabama, and applied for vocational training and compensation; that he was refused vocational training; that some time in September he hired out for the Southern Railroad at Sheffield, Alabama as a yard brakeman switching, coupling and uncoupling cars and pass signals; that he received $6.00 and something per day; that he worked about half the time; there was plenty of work to be done but he wasn't able to do the work; he was tired and his

(Testimony of Walter Woodall)

stomach hurt and he had pains in the right side and chest; that he would rest a good deal, and some of the boys would do some of the work for him, and at other times he wouldn't have anything to do, when there were no trains to be made up or distributed. He left some time in December of 1920 or the first of January, 1921 as he wasn't able to do the work. He was tired all the times, had pains in my chest and stomach and sour belches. He went down to New Orleans asked to go into vocational training and was refused. He then went to Taft, California, where he was treated by Dr. Hawkins; stated that he went West because Dr. Hodges told him his health would probably be better; that while at Taft his stomach bothered him a great deal; he was tired all the time; had pains in the chest and had diarrhoea; that this was in the spring and summer of 1921; that he went to Los Angeles and finding himself out of money went to the Red Cross and they sent him to the Public Health Service, which organization sent him to the Hospital at Sawtelle where he was told he had TB and was sent to the TB Hospital; stated that he was lighter than when he went into the service, probably five to ten pounds lighter; that he did not look for any employment there, at Taft; he wasn't able to work; that he was in the tuberculosis hospital in Los Angeles in 1921 until some time the next year; tried to go in training and that was told that he wasn't able, took it easy and later on they told him he was feasible for training and he went to school studying reading, writing and arithmetic; that prior to service he had had probably a fifth grade education in a country school; that he went to the John R. Paul Undertaking

(Testimony of Walter Woodall)

Parols for training in undertaking and embalming working under Mr. DeSpain; that he still had pains in the stomach and right side and was coughing; that he was too sick and was discharged and they said he was not able to take care of the work; that while he was there he was there continuously, that there were from one to three bodies to be embalmed each week; the formaldehyde made him sick; and caused him to vomit; that he left there and went back to Alabama because his mother was sick; some time in 1923 he worked a month for the Southern Railroad Company, about a third of that time, and then went over to Memphis and worked for the Illinois Central Railroad. He could not work all the time as he was tired and had pains in the stomach and would "give out"; that his friends in the Illinois Central helped him a great deal and that they would let him sit down and rest and did a great deal of the work for him; that his appetite was poor; that he was with the Illinois Central three or four months, he did not remember exactly how long; he left there for the same reason he left the other job; that he was too tired and not able to work; that from there he went to a government hospital for an operation; that after three weeks he was taking up specialty salesmanship selling tailor made shirts, working on commission, probably making $30 or $40 a month; that he kept no record; that he would work two or three hours, rest a while and then would go back to work some more, probably five or six hours a day; believed he gave that up after two or three months, some time during the latter part of 1924 or the first part of 1925, and that then he went down to Honduras in Central America; that he heard it was a good

(Testimony of Walter Woodall)

climate at Honduras for tuberculosis and living was cheap; that his mother financed the trip down there, sent him money each month, and that he was there for about two years; treated by native doctors and an *a*merican doctor; that while he was there he worked for a part of the time for the United Fruit Company as a conductor, first about two months then about three months, more, a year later, making one or two trips a week as conductor of a banana train; that business was very dull and there wasn't much work to do; he would take orders from the telephone booth from the dispatcher and take copy of the orders to the engineer, give the brakeman instructions and then return to the caboose and lay down and rest; that there was plenty of work that might have been done by him full time but because of his condition he didn't work more than two days a week; that he was tired and had a bad stomach; that while in Honduras, except when he was working as a freight conductor, he didn't do anything; he sat around and rested and took life easy and tried to get well; that the doctors in Honduras told him to go to a hospital; that he left Honduras and went to New Orleans and wanted to get in the Hospital there but that they stated they did not have any beds so he came back to California and entered the hospital at Sawtelle, which was about 1927, where he remained until 1928 when he contacted Dr. Beem during January or February as he was having diarrhoea, pains in his stomach, sour belches, pains in his side and a tired feeling; that when he left Sawtelle

he came to the Veterans Bureau and they sent him to the Naval Hospital at San Diego in 1928; that about a month or two later he was discharged from that Hospital when he went back to his home in Alabama. In 1929 he was hospitalized at Oteen, North Carolina.

CROSS EXAMINATION

The witness stated that after the ROANOKE was turned into a troop ship he did not sleep in a hammock but had a bunk; that he was still taking care of the evaporators; that with the exception of two or three months in which he was a stoker he was on the evaporators, which was easier work; that he reported to the ship's doctor, he did not remember how many times, for stomach trouble, pains in his chest, cough and a bad cold and also a chancroid; that he had not seen his medical report, and that if his medical report showed that his only contact on shipboard was for a chancroid it was not correct; that at the time the report for chancroid was made the ship carried but one doctor and that he was the same doctor he reported to for the stomach trouble. He was discharged at Bay Ridge on September 11, 1919 at the Receiving Station; that prior to his service he was firing boilers on a sawmill where they used wood for fuel, and mining on which job he had been paid $6.00 to $7.00 a day; that he had worked on that job for five or six months; that he helped make a crop with his brother, they were either working on the farm or at the saw mill; worked at different mines for different people during the five or six months; was very hot in some parts of the mine and dangerous there, and therefore wouldn't work there

(Testimony of Walter Woodall)

but would get a better place. Did not remember how long he worked at any of the mines. He would quit one job and go to another, sometimes he would quit one day and get a job the same day; that he would go to work and after quitting in the morning would go to work in the afternoon for someone else; that he might have taken a week off between jobs but before he went in the service he would generally make a crop in the spring and would fire in the fall in the sawmill; that his brother ran one and he worked for him and worked for others; that he did this over a period of three years or so during which he worked for different people.

Witness stated that after he was discharged it was six weeks or two months before he went to work; that Dr. Evans treated him for stomach and gall-bladder trouble and cough; that Dr. Evans made a report to the Veterans Bureau in the form of an affidavit; did not remember what treatment he gave him for lung trouble; that this stomach and gall-bladder trouble was the same trouble for which he was operated; that it got worse and he had an operation on June 24, 1920; that at that time he did not know of the Veterans' Bureau; that Dr. Evans gave him cough medicine; that before he had the gall bladder operation he was working in the oil fields; that he worked there two periods, one for six weeks and then worked about two months more making $4.00 to $4.50 a day on the days that he worked; that he kept no record of his employment.

He identified his signature on an application made in August, 1920 on which it was stated that he worked from

January, 1920 to May, 1920 at $6.00 a day, but that this did not refresh his recollection as to how long he worked; that he would get sick, lay off, and then return to work; that after his operation he went to work for a railroad; that he had a physical examination before he went to work by the Company doctor who passed him for work on the railroad; he was put on the extra list subject to work at such times as he was called; that he could work most any day he wanted to; that he worked when he was called in 1920 after his operation; that he did no work in Taft and had no contact with the Veterans Bureau; between the time he arrived in Taft and stayed four or five months, and went to Los Angeles, he did nothing at all living on money that he got from home; that he came down and went to the government hospital at Sawtelle and then went in training; that while in the hospital at Sawtelle he had pills and one thing and another including diet and rest in bed; and he had an operation for appendicitis while he was there in 1921; that he was receiving compensation then of $80.00 per month when he left the hospital and he went in vocational training; he would go to school one or two times a week for an hour or so in the evening and go out at an undertaking parlor and got practice work in the daytime; that all the time he was there he was sick, tired and coughing, pains in the stomach and sour belches; that he tried to make all his classes; did not remember whether he did or not; if he did not feel like it he did not go; he was not sure whether he missed any classes but would lay off a day or two once in a while at the undertaking parlor. It was about the last of 1922 or the first of the year 1923 when he quit

(Testimony of Walter Woodall)

training; that his mother was sick and that he then went back to Alabama; that he was drawing compensation which he did not get for several months; that while he was in training he did not remember whether he got any medical attendance or not; that if he complained they would put him back in the hospital; but he did not believe that he did complain; that he did not remember saying to anyone that he needed medical attention nor did he report to anybody in connection with the Veterans Bureau that he wanted physical treatment. Witness states that sometime after he returned to Alabama he went to Dr. Bridges. He saw him when he went back and before he went to work for the Southern Railroad Company for the second time; that when he went back to work for the Southern Railroad for a month or so they had his record of their first examination and asked him if his health was as good as it was and they put him back to work; that the doctor did not examine him again; that he went back to the same job; that he worked there for a short while and this was about six months after his return, probably the middle of 1923; that he did not go to a doctor during that period; then went to Memphis where he worked about thirty days for the Illinois Central Railroad. Witness stated that when he went to Memphis, Tennessee to work for the Illinois Central he took a physical examination for the job and was passed and put on the extra list; that he worked when he was called but sometimes did not answer the call; that he was not on a regular run and that while he was working there he was receiving government compensation; that his compensation was cut off without an examination; that he had a fistula or something the matter

(Testimony of Walter Woodall)

with his rectum and went to the Veterans Hospital in Memphis and was operated on for that. After he came out he went to selling some shirts, he believed, and then went to Honduras; that somewhere along the end of 1923 his compensation was cut off and he did not try to get it reinstated; that when he arrived in Taylor, Honduras, the Company Doctor examined him before he got his job and passed him for work, which was routine; that he went to San Pedro in Honduras, which was in the interior a good ways back, in the higher altitude, and that he was directed to go there by the company doctor; that he remained there a couple of years and that the doctor would come and see him at the apartment; that he worked there a little while for the United Fruit Company twice, and his mother sent him a little money as he needed it; that he never wrote the Veterans Bureau and asked them to reinstate him; that he did not report to the Veterans Bureau again until 1927 when he applied for hospitalization in New Orleans; that when he returned to New Orleans and applied for hospitalization there he was unable to get a bed; that he stopped in Texas and worked for the K. C. M. & O. Railroad, the Kansas City, Missouri & Orient; that he made a few trips there, and in 1927, and that when he obtained that job he had a physical examination and was passed; that he worked there a short time on the extra list and then came to Sawtelle, California; denied that he made a statement to the doctors at Sawtelle that he h... not been treated by any doctor since 1923.

(Testimony of Dr. Rayford Hodges)

REDIRECT EXAMINATION

Stated that in Texas in 1927 he worked about six or eight days, just to get enough money to go to California; that when working for the Southern Railroad he was in the switchyards subject to call from the call boy; if he felt like it he would go to work and if he didn't he wouldn't go, but that he had an opportunity to work every day if he had wanted to.

DR. RAYFORD HODGES,

a witness who testified for the plaintiff by deposition; stated that he had been engaged in the practice of his profession since 1915 having served in the army as a doctor during the war with ranks of Lieutenant and Captain; that he had known Woodall, the plaintiff, for thirty-five or thirty-six years; they lived on adjoining farms; that he first treated the plaintiff professionally in June or July of 1920 and off and on during the summer of that year; that at that time the plaintiff was complaining of a cough, bronchial condition, pain in his chest, pain in region of liver and gall bladder; that he found a chronic bronchitis and practically all the symptoms that go with it, cough, bronchial rales, chronic hacking cough and pain in the region of the gall bladder, tenderness and, best he could remember, he could outline a mass of gall bladder tumor; that after his examination Woodall had an operation for gall bladder trouble and that he came to the doctor's office for dressings, exact dates not known, but before December, 1920; said that he made the diagnosis of Woodall's case as best he could under the conditions under which he was working of gall bladder

trouble with possible gall stones or inflamed chronic bronchitis, severe, with possible tubercul*o*r condition; was not in a position to x-ray and work out a diagnosis on the tubercular; he told the plaintiff that he was suspicious of the tuberculosis and possibly had a tubercular condition; told him to take care of himself, and put him on a little phosphate of soda and gave him a little cough medicine with creosote in it; no record was made of the examination; probably treated plaintiff a dozen times or more and dressed his operative wound a few times. Stated he believed plaintiff was unable to work in 1920; that the plaintiff left and went out West but had been in and out of Scottsboro at intervals; that the doctor had seen him practically every year for the past five years; that he did not believe Woodall was able, during that time, to do manual labor continuously. Doctor was given the definition of total and permanent disability and asked whether, in his opinion, Woodall was totally and permanently disabled at the time he first treated him in 1919. Dr. stated it was his opinion the man had pulmonary tuberculosis at the time he checked him over because he had all the symptoms; stated that the temperature he had might have been from both his gall bladder condition and lung condition.

CROSS EXAMINATION

On cross examination the Doctor testified he made no record, clinical, took no sputum or fluoroscope examinations; that he believed that, at the time, Woodall had a bronchial trouble and gall bladder indisposition; that after he treated him in 1920 it was about eight years until he

(Testimony of Dr. R. R. Bridges)

saw him again; said he did not know about whether Woodall had been permanently and totally disabled since 1920; thought that the condition might have been with him since that time but had not seen him enough; finally answered the question by saying that he thought that plaintiff was totally and permanently disabled in 1920; the witness admitted there were occupations Woodall could have held down fairly well where not much physical exertion or exposure was required; did not know whether or not Woodall was employed in 1921, 1923 or 1924; said in his opinion the operation and drainage of the gall bladder trouble was successful; that his wound healed up all right and that he had temporary relief.

DR. R. R. BRIDGES,

a witness on behalf of the plaintiff, testified by deposition substantially as follows:

That his residence was Scottsboro, Alabama; that he had been practicing medicine since 1914; stated he graduated from Vanderbilt University, Nashville, Tennessee; that he knew Walter Woodall; that he first *reated* him, he thought, in the fall of 1923; could not remember the month; that he last treated him in March, 1932; that the first time he got a history and made a physical examination and told the plaintiff he thought he had tuberculosis; that he made no record and believed that the plaintiff had told him he was short of breath and had night sweats, afternoon temperature, inability to do anything; found no moist crepitant rales but that Woodall had prolongation of the breath sounds and a slight dullness of percussion notes; did not remember whether he told Woodall he had

evidence of pleurisy or not on this first examination; said he was running a slight temperature; told Woodall he based his probably diagnosis on his loss of weight and night sweats and prolonged breath sounds with afternoon temperature; and told him also he regarded him as a suggested case; that his diagnosis was pulmonary tuberculosis; that he prescribed rest. He had no records; that he lost sight of Woodall a day or two after the examination and did not see him any more until 1928 at which time he proved tuberculosis by positive sputum; that he believed he had pulmonary tuberculosis from the first time he saw him. He also stated he treated him a few weeks in 1928; he believed that Woodall might have done a little work along at times, something light when he was quiescent.

In answer to the question containing the definition of total and permanent liability, the doctor stated he would answer yes that he was totally and permanently disabled in 1923, because of pulmonary tuberculosis; stated that he believed Woodall had a lung condition before 1923 but could not say how far back he had it, some cases are fast and some slow. His opinion was that he had it several months before he saw him but the months he could not put down in figures. When he examined the sputum of the plaintiff in 1928 he found no red blood. That a patient might die from tuberculosis and never have a hemorrhage.

CROSS EXAMINATION

On cross examination the doctor admitted that some time between 1919 and 1923 the condition arise; that

(Testimony of Dr. R. R. Bridges)

plaintiff's condition was advanced far enough when the witness saw him in 1923 to say that he had tuberculosis, but how long he had it, the witness could not state; did not know what Mr. Woodall was doing at the time he examined him in 1923; had not known him previous to that time. In 1923 when he examined Woodall if he made a record he could not find it and everything was stated from memory; that he made no record of his 1928 examination; that he had examined Woodall since 1928, about a week before the deposition, (which was taken March 23, 1932); found a temperature of 99° and a pulse of 90, fine crepitant rales in the left lung, upper lobe, blood pressure, systolic 144, diastolic 118, rapid respiration; prolonged vicular murmur; distant air sounds in upper right lobe, right lung; acute laryngitis, but no examination was made of the sputum; believed his condition was worse than in 1928; stated that his prognosis was bad; that the plaintiff would get worse; believed that his condition might be arrested by proper care and treatment, the arrested condition to flare up later; stated that he knew of no industrial activity that the plaintiff had engaged in since he had known him except that the plaintiff had once tried to sell him some tailor-made shirts.

RE-DIRECT EXAMINATION

On re-direct examination he stated that he believed the plaintiff was totally and permanently disabled at his last examination, a week before the deposition.

RE-CROSS EXAMINATION

On re-cross examination he stated that he did not remember whether he saw a gall bladder operation scar

(Testimony of Dr. Marvel Beem)

or not in 1923; said there was a scar and he guessed it was gall bladder; did not know whether the operation was a success or not because he stated it was "sorter over my head".

DR. MARVEL BEEM,

called as a witness on behalf of the plaintiff, the defendant having stipulated orally, in open court, as to his qualifications, testified substantially as follows: That in 1928 he was practicing at Sawtelle, California, having graduated in 1924; that he was not specializing; that he examined Mr. Woodall in the early part of 1928; that at that time he dictated a letter from his findings and records; that after refreshing his recollection he identified a letter of February 9, 1928, and remembered that he had examined Woodall in the course of his treatment of him as his physician; that after the examination, in getting his history, the plaintiff told him that he had had a disease of the gall bladder which had been diagnosed as empyema. The doctor had referred him to the X-Ray Laboratory at the Santa Monica Hospital where he was x-rayed for gall bladder disease, and there was a positive report from the laboratory that gall bladder disease was present; that the diagnosis was made of stone in the gall bladder and chronic gall bladder trouble; that he advised Woodall at that time to have the gall bladder removed. The doctor stated that empyema of the gall bladder is a condition in which the gall bladder fills with pus; that the condition described as having existed, such as severe pains in the stomach and vomiting frequently with pains in the side and diarr*hea* and constipation in 1918, 1919 and 1920

(Testimony of Dr. Marvel Beem)

might be related to the gall bladder, and that it was significant that after the gall bladder had been removed in 1920 and the incision healed the same condition continued with a yellowish color of the skin; the significance was that it was often impossible to remove a gall bladder when there was an empyema present and that it would be necessary to treat the condition which leaves the gall bladder, and it is possible and often occurs that the gall bladder becomes a continual source of irritation and trouble and has to be treated again later on; that such a condition permits bacteria and poison to go through the system and affects the resistance of the body to any other diseases. Doctor further stated that it was possible and probable that at the time of the trial there were adhesions in the plaintiff's gall bladder area on account of a chronic disease; that the effect of this on his ability to follow a substantially gainful occupation continuously would depend on the severity of the symptoms and might have a great deal to do with it; that a tubercular condition of the intestines might have been present; that the fact that there was a gangrenous appendix in April, 1922 might have been related to the gall bladder trouble; that these symptoms of the gall bladder and intestinal tract and appendix would lower the general vitality and be disposed to pulmonary tuberculosis, if that is present. Doctor testified that a "hypertonic" type of stomach meant that it empties more rapidly than usual; that a cholecystitis was an inflammation of the gall bladder, a chronic condition present all the time; that that condition would have a tendency, if present, to cause a patient to vomit frequently, lose his appetite and have pains in his abdominal region; that it

(Testimony of Dr. Marvel Beem)

would affect his ability to follow continuously a substantially gainful occupation because he would be a sick man and unable to pursue his ordinary occupation, and that if the disease was superimposed with tuberculosis, it would have the tendency to aggravate the condition.

CROSS EXAMINATION

On cross examination the doctor testified that, at the time of his examination, he did not recall that he examined Woodall for a tubercular condition and had no record of it; that whether he noticed it or not would have depended on whether the patient was suffering from an acute condition in the gall bladder area and the other was more or less chronic and not bothering him at the time; did not recall whether Mr. Woodall give him any history of tuberculosis; that he thought that had Woodall said anything about tuberculosis he would have noted it; that if he had been far advanced in tuberculosis so that it would effect his general condition and health it would not necessarily have a material effect on the disease described by the doctor; stated, however, that if Woodall had had advanced tuberculosis it would have jeopardized his treatment, particularly as to an operation, and that had it been far advanced to have affected his general condition he thought he would have taken it into consideration at the time of the examination; that plaintiff's gall bladder condition back in 1919 and 1920 would undoubtedly cause adhesions; that he did not know the details of the gall bladder condition previous to his examination; and that an operation ordinarily performed for gall bladder would not necessarily produce a condition so that the man could not

(Testimony of Dr. Marvel Beem)

work, but that cases of this type that have an empyema and are operated they can have adhesions sufficiently severe to keep the person from working, which the doctor stated was physical work, not necessarily heavy but physical work; doctor stated that at the time of his examination the man was unable to work and he was complaining of acute trouble in his gall bladder area which was shown by tenderness in the gall bladder area and which condition the doctor believed could be cleared up by surgery; the doctor admitted that he knew nothing about the man's condition other than his gall bladder.

RE-DIRECT EXAMINATION

On re-direct examination the doctor stated that if previous to the time he saw Woodall he had had the same symptoms he described as when he came to him in 1923 it would indicate that the condition was sub-acute or acute at those times; that at the time of the operation in 1920, because of the accumulation of pus, it was impossible to remove the gall bladder and there was a tendency to form pus again; that it was common to have a residual inflammable condition in the gall bladder and even the formation of stones after it was drained; that if stones were present in 1920 they probably removed them. He stated that usually the drain does not form another empyema but becomes chronically inflamed and formed more stones and it is possible to have another empyema; that the plaintiff had no empyema when he saw him, which would be

reflected by temperature and vomiting; that the gall bladder was closely associated with the liver and a yellow complexion might indicate that plaintiff had stones at that time, or more likely that he had an inflammation of the liver.

DR. HARRY COHN,

a witness called on behalf of the plaintiff, testified substantially as follows: That he was admitted to practice in 1908 and had specialized for twenty years in diseases of the chest; that immediately after the war witness was consultant of an advisory board for vocational certificate in Washington, then was with the United States Health Service, and then later with the United States Veterans' Bureau; that he is the Director of the Division of Tuberculosis of the Los Angeles City Health Department. The doctor was given a hypothetical question which assumed to be true the facts testified to on behalf of the plaintiff; the findings as to the X-ray examinations made of the plaintiff August 2nd, 1921, and the several findings diagnoses made in medical examinations of plaintiff made during March, April and July of 1922, in August, 1923, in February, 1928, and in January, 1929, and the physical findings of Dr. Hodges of the examination of 1920, and was given the definition of total and permanent disability which applies to these cases; and that it should also be assumed that he had possible tuberculosis present in 1920; stated that he had an opinion which was that the plaintiff was totally and permanently disabled from some time prior to the first day of January, 1920; that as reason for his

(Testimony of Dr. Harry Cohn)

opinion, the Doctor testified that a man at the age of 33 does not ordinarily or often develop tuberculosis; that he was sick enough to be diagnosed as an active case of tuberculosis in 1921, within two years from the date of discharge and, according to Dr. Hodges, was diagnosed as an active case of tuberculosis within one year from the date of discharge; that in this case when the diagnosis was first made, and within two years from the date of discharge, it showed tuberculosis involving the upper portion of both lung fields with considerable scar tissue; that it took time for tuberculosis to extend from the beginning area to one upper lobe and then spread into the opposite lung; that it was obvious the man had been suffering from tuberculosis for a longer period of time and that amount of tuberculosis, which was present at the time the first x-ray was made, had been present in that man's chest for a considerable period of time and was undoubtedly present at the time of his discharge from the service and was active at that time. Doctor stated it ordinarily takes a certain time for dormant tuberculosis to become active; it was evident that the plaintiff had considerable stresses while in service and that work he did while out of the service may have aggravated his tuberculosis but was not responsible for the development of his tuberculosis. Doctor stated that it was a mooted question as to whether the tubercular condition was aggravated by the stomach disorders; that the probabilities were that both infections were operating at the same time; that conditions like the digestive disturbance might interfere with a person's rest and digestion and so permit tuberculosis to spread.

(Testimony of Dr. Harry Cohn)

CROSS EXAMINATION

Dr. Cohn stated on cross examination that tuberculosis was curable; that as a general proposition in an advanced state it was not curable but there were many exceptions and that even in the advanced stages it might be cured; that approximately sixty or seventy per cent of so-called early cases were restored to part time working capacity; doctor stated that he would say that six months prior to the time the first doctor said he had tuberculosis he was incurable, but if he were there in 1920 and examined the man and the man possibly had tuberculosis he could not render an opinion as to whether he was curable or not; that his opinion was in 1933 and that he couldn't render an opinion as to curability in 1920; that the presence of another disease in 1920 makes the other look more unfavorable; asked specifically about tuberculosis, in which the doctor specializes, he stated that he could not express an opinion that at that time he was incurable. Doctor bases his opinion in part on the first x-ray report which was taken two years after the plaintiff's discharge, which shows a moderately advanced tuberculosis, in both lungs, and that it would require two years for that condition to develop; that it would not develop any more rapidly because of gall bladder trouble; that some parts of Honduras are extremely favorable because of the elevation, but that the running inland and to the coast, etc., might aggravate tuberculosis and if the condition was incurable at that time the running on a train would hasten the progress of the disease; that it was surprising how long a man could live under such conditions, but the doctor stated that during all this time he was permanently and totally

(Testimony of Dr. Harry Cohn)

disabled with periods of remission. The doctor stated that taking into consideration the definition of arrested tuberculosis by the National Tuberculosis Association he disagreed with the opinions of the other doctors who said that the disease was arrested; that the definition of "arrested tuberculosis" as adopted by the National Tuberculosis Association, requires that before a diagnosis of arrested tuberculosis may be made x-ray pictures must show an integration or healing of the involved area; that the physical finding must indicate that the tuberculosis is healing; that the sputum contains no evidence; that the patient has been under these conditions during a period of six months and that during the last three months of which the patient has been taking exercises of two hours daily in the form of walking or its equivalent; that there is nothing in the record showing this man had been on exercise or that the condition had lasted for the period required by the definition of the National Tuberculosis Association; that under ordinary conditions, the best that a doctor could say was that the disease was no longer active; that a doctor who had only seen the plaintiff one time was, in the opinion of the witness, not qualified to make a diagnosis of arrested tuberculosis; that he based his opinion upon the condition present at the time the first diagnosis was made and upon the findings in all the reports and on the man's present physical condition, and on the doctor's knowledge of the duration of tuberculosis and the change that may take place in a patient's lungs during the course of his tuberculosis; that he did not agree with the judgment of the other doctors; that sometimes incurability developed within six weeks or six months

from the date of the onset of the disease; that he had personally examined the plaintiff. He testified that many cases of advanced tuberculosis are not discovered until pictures are taken of the chest; that the patient may be apparently well; there are cases where tuberculosis develops and it may be widespread before it comes to the surface; that a man may become totally and permanently disabled and be incurable and he can't discover it; that the man had probably had tuberculosis fifteen or twenty years but it was present several years before it was discovered; could not say that he was permanently disabled before he went into the Navy but he had some tuberculosis when he went into the navy and he became totally and permanently disabled some time prior to his discharge. The doctor further stated that he accepted the diagnosis that the doctor made two years after Woodall's discharge; that it is a very common observation to find patients who are totally and permanently disabled, having an advanced case of tuberculosis, which is probably incurable, to have them work occasionally or a little bit, or to move about the country without medical supervision or attention of any kind for several years without absolutely killing themselves; that patients come into clinics every day who are far advanced cases of tuberculosis and who are employed, and it is necessary for the doctors to frequently invoke the law to make them stop work; that sometimes the case becomes incurable within six weeks or six months from the date of onset, with the best medical supervision. Since 1922 the medical profession has learned a great deal about tuberculosis, particularly those types which start near the collar bone. In those cases advanced tuber-

(Testimony of Dr. Harry Cohn)

culosis may develop in a relatively short period of time and the patient becomes totally and permanently disabled in a relatively short period of time, and the symptoms may be so slight that the patient doesn't realize it or appreciate it. In this particular case, the doctor further stated, that he could appreciate the difficulty, for the plaintiff at that time was also suffering from another disease, which guided his symptoms and the tendency would be for the examining physician and the patient himself to concentrate upon his abdomen rather than on his chest. That unusual stress weakens the body, and allows tuberculosis to spread into the lungs, and that is what happened to the plaintiff.

RE-DIRECT EXAMINATION

The doctor stated, on re-direct examination, that it appeared that the man gave the same symptoms in 1921 that he gave at the time of his discharge, and pointed out that the disease had been spreading through both lung fields ever since its discovery in 1920.

RE-CROSS EXAMINATION

On re-cross examination the doctor stated that this type of tuberculosis did not develop quickly, it was gradual and slow and if discovered within six months after discharge it would show there was a considerable amount present; that it was impossible for this to have developed in the two years between the time of discharge and the time of the first x-ray. The doctor was asked whether or not, previous to the two year period and at the time of discharge, if the man had gone to the hospital and taken proper care and proper medical attention, what the proba-

(Testimony of Dr. Harrison M. Hawkins)

bility of a cure would have been. He stated that there were several probabilities; the most important thing would hinge upon the proper diagnosis being made at that time and the proper conditions and treatment; that he could not answer the question because he did not know, but that after the two year period and at the time the x-ray was taken, if he had gone to the hospital and taken proper care with the then existing amount of lung destruction and scarring he could not have been cured.

RE-DIRECT EXAMINATION

On re-direct examination the doctor stated that the age of 36 or 37 had an *affect* on the probability of cure as at that age tuberculosis tends to become chronic.

RE-CROSS EXAMINATION

On re-cross examination the doctor stated that the older a person gets the more readily they can form scar tissue, and therefore an action takes place in the tissues that tends to scar tissue rather than something else.

DR. HARRISON M. HAWKINS,

a witness called on behalf of the plaintiff, testified substantially as follows: That he was a practicing physician and surgeon in April and May, 1921, and had been licensed to practice in California since 1915, having graduated from Jefferson Medical College in 1914; had specialized in surgery but had done general work; that in April or May, 1921, Woodall came to him for treatment; he examined him for treatment at that time at Taft, California; that he did not have his records but he made an affidavit on or about September 13, 1921; the information was taken from

(Testimony of Dr. Harrison M. Hawkins)

the records that he then had. Witness stated that his memory would not be refreshed by inspecting the affidavit, and that, as he remembered, the plaintiff had an infection of the bowels with some disturbance of the gall bladder when he saw him in 1921. He then refreshed his recollection from the affidavit and stated that Woodall was badly fatigued and considerably emaciated and he was having a great deal of distress with his stomach in the way of digestion, and on a physical and laboratory examination discovered the bacilli which the doctor said was the real cause of plaintiff's operation before; responded to treatment rather slowly; oftentimes it is necessary to give months of treatment before the bacteria is eliminated; found no other condition that the witness could recollect except considerable adhesions about the place where the gall bladder was; claimed the man was too weak physically to follow any occupation at that time and did not remember whether any complaint was made to him about any other disease.

CROSS EXAMINATION

On cross examination the doctor stated that he thought at that time that as soon as the bacteria was eliminated the man should improve and that the adhesions about the gall bladder usually accommodate themselves as they pick up; they usually accommodate themselves as the patient increases in vitality, so that in a little time he does not notice them in doing his ordinary work. The doctor was asked whether he noticed anything that would lead him to believe the man had tuberculosis, and stated that not having his records he could not recall, but that the affidavit was made at the time of his examination when things

(Testimony of Dr. Harrison M. Hawkins)

were fresh in his memory and that if he had found any particular symptoms of tuberculosis he would have noted them, and the fact that he did not note them would lead him to say that he had found none.

RE-DIRECT EXAMINATION

On re-direct examination the doctor stated that he did not recall that he made an examination of the chest by x-ray or of the sputum; he answered that he did not necessarily mean that a tubercular condition might not have been present but he did not examine Woodall for that and did not pay any particular attention to the chest with an idea to tuberculosis.

Plaintiff's Exhibit #2, being the Navy Health Record of Walter Woodall was introduced.

Plaintiff's Exhibit #3, being the plaintiff's service record was introduced.

Plaintiff's Exhibit #4 was introduced and stipulated that it showed the record of the first period of employment of Walter Woodall with the Southern Railroad.

Plaintiff's Exhibits #5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 were introduced in evidence, the same being reports of physical examinations, excluding therefrom, however, all history and statements of "Present Complaint" which might appear in those records, and also excluding from plaintiff's Exhibit 7, that part which refers to an examination of Dr. Magruder.

The plaintiff rested, whereupon the defendant made a motion for judgment on the ground that plaintiff had failed to establish total and permanent disability from the time the policy was in force and effect, which motion was denied without prejudice.

(Testimony of Dr. Elliott P. Smart)

DEFENDANT'S CASE

DR. ELLIOTT P. SMART,

a witness called on behalf of the defendant, testified substantially as follows: That he graduated from the Medical Department of the University of Southern California in 1912; that he had done post-graduate work in New York, particularly on chest work, particularly tuberculosis, and had specialized in that line of work ever since; that he was, and still is, for eight years prior to the trial Medical Director of the Olive View Sanitarium, Los Angeles, California, where he was still employed. He identified plaintiff's Exhibit #22 as a report of examination that he made as a special examiner of the U. S. Veterans Bureau for hospitalization purposes on July 7, 1922; that he felt at the time that the man could work and that there were a good many occupations which he could follow; that he believed at the time that the man had a curable condition, which condition was shown on the report; that it was a minimal case of tuberculosis and he had mentioned it in his report as being arrested. The doctor stated that he believed the man was no longer suffering from the acute disease, the disease had become partly healed, except from the stated point of supervision, and he felt that suitable employment, as he had set down, vocational training and supervision would carry the man out and rehabilitate him. He did not feel that the man was permanently disabled or totally disabled at all.

(Testimony of Dr. Elliott P. Smart)

CROSS EXAMINATION

On cross examination Dr. Smart stated that future history of a tubercular patient would have a bearing upon the diagnosis as to the permanent arrestment, but that that depended upon the type of involvement present; that if a man had cavitations, and particular types of cavitations, and locations, but infiltrations and fibrous without cavitation would not; that considerable cavitation would indicate that the disease had been greatly active; that if there had been extensive cavitations in the right lobe at that time of sufficient size it was a moderately advanced case and had, of course, been active; if it is active it isn't mderately active; that it is either active or *adolescent*; that considerable cavitation would indicate a considerable period of activity; that a fibrous condition would be indicated in an x-ray and with the x-rays they would have to have all the other findings to examine the x-ray; stated no x-rays were taken at the time; the doctor stated that the fact that x-rays were taken in 1921 would not aid him in his opinion unless he saw the x-rays himself; doctor stated that the surest method of diagnosis of tuberculosis is to x-ray and examination of the sputum, not just one but repeated examinations where the sputum is positive and the x-ray shows fibrillation and cavitations. The fact that one sputum examination is found to be negative does not necessarily mean that the plaintiff does not have active pulmonary tuberculosis.

RE-DIRECT EXAMINATION

The doctor stated, on re-direct examination, that they always found active sputum in an active case; that the dis-

(Testimony of Dr. Oscar S. Essenson)

ease might be present in the body and the sputum not show activity, classified as a latent and a dormant period and later breaking out again; doctor further stated that if from all probable evidence there were no findings to show active tuberculosis, and negative sputum with repeated tests, and if the x-ray is negative as to progressive lesions, he would feel that it was an arrested case, and no findings were evident, and that might exist after an active tuberculosis and a cure was possible to that extent.

RE-CROSS EXAMINATION

On re-cross examination the doctor stated that after a length of time you couldn't make a diagnosis on one examination unless you had enough previous history and findings to go with it to substantiate it. The doctor testified that he was acquainted with Dr. Fishberg and his book on tuberculosis; that Fishberg was one of the leading authorities on pulmonary tuberculosis. The doctor also stated that he had been Medical Director at Olive View for eight years, which was a tuberculosis hospital exclusively with nine hundred odd beds; that they had thousands of tubercular patients and almost 600 cases at its outside clinic.

DR. OSCAR S. ESSENSON,

a witness called on behalf of the defendant, testified substantially as follows: That he had been dealing as a specialist in tuberculosis for twenty or twenty-one years, and had been a tuberculosis examiner with the Veterans Bureau since 1920; that he graduated from Baltimore University, School of Medicine in 1899; that he did post graduate work in New

(Testimony of Dr. Oscar S. Essenson)

York and various hospitals and medical schools; that he made an examination of Woodall; identified Plaintiff's Exhibit #13; that it was the doctor's opinion based on his physical findings that the plaintiff could follow an occupation at the time he examined him; that the man had arrested tuberculosis which he characterized as a healed condition which he determined by examination substantiated by x-ray findings which he had made at that time; that he found no evidence of active tubreculosis; that there was an arrested tuberculosis of both upper lobes with no evidence of any active processes, no evidence of cavitation and the sputum was negative for TB bacilli. The examination was made on October 13, 1922. Doctor further stated there was nothing in his findings to show that the physical condition of this man was such as would interfere with his doing a normal day's work.

CROSS EXAMINATION

On cross examination the doctor stated, in answer to a question as to whether, if this man went out and worked after being told his case was arrested and within four months he had a breakdown, his diagnosis would be correct, that it would depend on what type of work the man was doing; that if a man was afflicted with tuberculosis he would not advise him to go and do a hard day's work; he could do ordinary easy work and it would do him no harm. The doctor was asked if he considered pains in the intestinal tract and suffering from gall bladder trouble would be a factor that might be considered; as no such finding was in the report it was asked as a hypothetical question, to which the doctor replied that it depended upon the type of complications; that if a man had com-

(Testimony of Dr. Frank L. Long)

plications and an intestinal trouble and gall bladder, work would do him harm; that if a patient had tuberculosis in a *cormant* or *adolescent* state, if there is a lowering of the resistance of the body, then 90% of such patients would again become active. The doctor stated he was personally acquainted with Dr. Fishberg and with his work on tuberculosis and to a certain extent he agreed with Dr. Fishberg, who is considered an authority.

DR. FRANK L. LONG,

a witness called on behalf of the defendant, testified substantially as follows: That he had been specializing in nervous and mental diseases; that he has been connected with the Veterans Administration since 1920; that he examined Walter Woodall on July 20, 1921; that it was a general examination; that he made no examination of the lung condition; that he only identified what is set down in the examination report; that the man was transferred to the Soldier's Home for further observation and treatment; that the diagnosis was a tentative diagnosis and if so the condition was probably remedial and could have been made better or cured if the diagnosis was confirmed.

CROSS EXAMINATION

On cross examination the doctor stated he had no recollection of the man; he was asked if he was a psychiatrist; stated that he made a few physical examinations, and the most in the last 10 or 12 years had been in the psychopathic department; that his examination was a superficial report for Dr. Foley who happened to be the Assistant in charge of the office.

(Testimony of Dr. Frederick F. DuPree)

DR. FREDERICK F. DuPREE,

a witness called on behalf of the defendant, testified substantially as follows: That he had been in the employment of the Veterans Administration since April 6, 1926, following the line of tuberculosis and psychopathic work; that he was specializing in tubercular work in the Veterans Hospital from 1923 to about three years prior to the trial, and was also in the Soldiers Tuberculosis Home. He received a degree in the University of Louisiana and also got a degree from the University of Tennessee in 1919, in Memphis. He identified Plaintiff's Exhibit #21, and his signature thereon, as the examination he made of Walter Woodall; that the report correctly reflected his diagnosis at that time; stated that God Almighty was the only one who could say that tuberculosis could be cured or not; that Dr. Fishberg stated in his book that whenever a doctor pronounces how long a man would live he would be sure of only what could be unseen, and that he could only predicate results on judgment and experience; they didn't think the man had active tuberculosis; that he could use reasonable judgment and say that he thought he was curable, that he thought he had no active tuberculosis and hence nothing to cure on July 8, 1927; that the plaintiff stated at the time that he had an "operation for gall bladder and appendicitis 1920 and 1922, West Ellis Hospital, Tennessee, Soldiers Home, California, 1921; Government Hospital No. 88, Memphis, Tennessee, 1923. Since then have not been treated either in hospitals or by private physicians." That he couldn't say that the plain-

(Testimony of Dr. Frederick F. DuPree)

tiff made that statement to him at that time; the symptoms were stated to a board of three doctors; that the statement about the plaintiff not having been treated was given to a physician, whether to him or not he couldn't remember, but was taken by a physician in the Receiving Ward. The doctor could not remember whether the statement was made to him or to one of the other doctors. The Board hasn't time to sit down and take history every time a patient comes before the Board, it would unduly prolong our examination. Sometimes the past history is taken from the doctor's findings in the receiving ward.

CROSS EXAMINATION

On cross examination the Doctor stated that frequently it is difficult to make a diagnosis of arrested tuberculosis without following the case further and he had recommended, for that reason, three months further hospitalization. He identified part of his examination as the x-ray made by Dr. Tinney June 27, 1927, which showed "Both lungs from the apex to the base show confluent and discrete mottling, with a questionable cavity in the right upper;" and stated that that meant the tissue of the lung was more or less abnormal, and it therefore, at that time, h*ave* been difficult to say whether it was active or inactive, so the diagnosis of apparently arrested is based somewhat on what took place afterwards; that the x-ray showed the area more or less infiltrated from the top to bottom of the lung so that it would be difficult for the witness to say whether the tuberculosis was active or inactive. The doctor stated that the "With a questionable cavity in the right upper" was put down because sometimes

shadows are interpreted as cavities and are not cavities; that the cavity has to be connected up with physical findings, and assuming the cavity was there he would have to know the degree of the cavitation and size and duration to case a fair prognosis on the case. The doctor stated that the term "vena cava is engorged" meant that the venous return of the upper portion of the thorax and the upper extremity of the head were larger than normal; that that would have a tendency to cause congestion throughout the lung and make an x-ray picture simulate tuberculosis; that it would have a bad effect on the general health and he would have a cough and symptoms of tuberculosis and physical findings would resemble tuberculosis; that to answer whether that man could follow a substantially gainful occupation would require that he know what caused the condition; that the statement about the superior vena cava being engorged shows the opinion of the x-ray man, or rather his impression. The doctor stated that it is impossible to make a definite diagnosis in the outset of the disease; that no doctor can tell whether he will die or get well unless he is in a rigor mortis state; that the fact that nine months after his examination, and on March 1, 1928, the man was rated totally and permamently disabled would show that his diagnosis made in July, 1927, was wrong and that if the man had activity he missed it, but that it hardly seemed reasonable that a man would be doing tubercular work for five to ten years and with all the laboratory methods, that he would miss a far advanced, active case of tuberculosis. The doctor testified that if a man had sour belchings, poor appetite and alternative periods of diarrhea and constipation, and

(Testimony of Dr. M. M. Nolan)

emypema of the gall bladder in 1920 parallel with his tuberular history, it would have a tendency to lower his resistance and keep the tubercular processes lower and hinder the recovery, if he did not have that gall bladder trouble. It would have a bearing on it because the only way a man could get well would be to eat himself out, but the fact that the man had a chronic gall bladder only would aggravate his condition to get well of tuberculosis, and might have a tendency to get a tuberculosis condition to flare up from an *adolescent* state.

The government then offered the statement of Walter Woodall which was made Exhibit A.

DR. M. M. NOLAN,

a witness for the defendant, testified by deposition substantially as follows:

That he graduated from Jefferson Medical College in Philadelphia in June, 1912; since 1916 he had been engaged in general practice in Birmingham, Alabama; between 1912 and 1916 had three years hospital work in Philadelphia; that on September 11, 1919, while with the Veterans' Administration he examined Walter Woodall. He identified the copy of his examination report which showed a finding on physical examination of negative with the exception of an operation scar over the gall bladder region with some tenderness and rigidity over this region; that plaintiff complained at the time that he had not fully recovered; that he examined the heart and it was normal; that the general physical appearance was good, and that Wood-

(Testimony of Dr. Thomas V. Magruder)

all was not totally and permanently disabled at the time of his examination. He further stated that the scar had healed at the time of his examination; that his prognosis was fair.

CROSS EXAMINATION

Upon cross examination the doctor stated that he had no independent recollection and that he was basing his testimony on his report dated August 30, 1920. The doctor stated he did not make any sputum tests or chest examination or laboratory examination; that the examination of the chest was limited to physical symptoms; that he did not, of his own knowledge, know whether adhesions had been left from the gall bladder operation; that adhesions are generally left; that in a small proportion of cases there may be a return of pus after the operation even after draining; that he was not a specialist in tuberculosis and could not say positively that there was not tubercular germs in the man's lungs at the time; that his diagnosis was subject to error as that of any other physician.

DR. THOMAS V. MAGRUDER,

a witness on behalf of the defendant, testified by deposition substantially as follows: That he graduated from Mississippi College in 1906, Tulane University in 1910, one year's interne at St. Vincent Hospital, Birmingham, Alamaba; that on August 30, 1920, he was a Public Health surgeon and examined Walter Woodall; that he had no independent recollection of having examined the plaintiff, and based his

(Testimony of Dr. Thomas V. Magruder)

testimony on his report; found that he had recently had a gall bladder operation, but seemed to have completely recovered and was not complaining of any symptoms; the prognosis was good as far as he was able to determine from a superficial examination and history; that he was not at that time totally and permanently disabled from following a substantially gainful occupation.

CROSS EXAMINATION.

On cross examination the doctor stated he had no independent recollection of the plaintiff; that he took no x-rays and that the principal part of his examination was to see whether the abdominal wound had healed from the outside. He did not know, and it would not be possible for him to ascertain from the type of examination he made, what the conditions were below the surface; did not remember complaints of ill health or tenderness over the region of the scar; made no general physical examination or examination of the lungs; made no x-ray; that his opinion regarding ability to follow a substantially gainful occupation was based on the external appearance of the wound and history given at that time; did not know at the time of the examination whether there was still infection in the area from which the gall bladder had been removed or whether there were adhesions; that adhesions under certain circumstances totally disable a man; stated he did not know whether the operation in this case was for drainage or removal of the gall bladder; that in order to foretell the extent of recovery in an operation of this kind contact should be made for a fairly extended period of time; that he saw this man once.

(Testimony of Dr. Louis F. Boyd)

DR. LOUIS F. BOYD,

a witness on behalf of the defendant, testified by deposition substantially as follows: That he had practiced at Memphis since 1917, after graduating in 1915 at the University of Tennessee as a general practitioner; that on April 10, 1923, while a part-time examiner for the Veterans Bureau, he made an examination of Walter Woodall; that the complaint at that time was pain in the chest and a cough, general weakness and the passing of mucous and pus in the stools; that he made a general physical examination with special attention to the chest. The doctor stated he had treated, with the exception of his hospital work, twenty five or fifty cases of tuberculosis and had examined many cases; that at the time of his examination of Woodall, his weight was 145, which, according to Woodall's statement, was normal; that the lowest in the year was 140, and the highest 145, therefore there was no loss of weight; sputum was negative at the examination as reported by the laboratory; that there was some impaired resonance in first and third rib anteriorly over both upper lungs and harsh breath sound above and below scapula, above the scapula over the left lung and above and below clavicle in second interspace and above the scapula over the right lung; that the record showed that the "applicant failed to report to hospital for laboratory work and X-ray of G. I. tract"; that the examination in this case was made

(Testimony of Dr. Walter T. Swink)

at 2:00 p. m. the temperature was 98.6 and pulse 78, which was normal; that his diagnosis was tuberculosis in both upper lobes, inactive. He testified, in answer to a question giving the definition of total disability that the plaintiff was able, at that time to follow the gainful occupation of freight brakeman, the doctor being familiar with the duties, and also could follow a clerical occupation or other occupations given by the doctor.

DR. WALTER T. SWINK,

a witness for the defendant, testified by deposition substantially as follows: That he was engaged in active practice for thirty six years following internal medicine, and that at one time he was doing tuberculosis work for about three years in hospitals at Memphis; that he identified a report, and refreshed his recollection; stated that he made an examination of Walter Woodall on April 10, 1923, consuming probably thirty or forty minutes; the examination was a general physical examination; that he arrived at a tentative diagnosis of fibrosis of both upper lobes of the lungs, inactive if tuberculosis. In answer to a question as to whether or not the plaintiff was totally disabled at the time, the question containing the definition of total and permanent disability, the doctor stated that he was not; that he could have followed the occupation of a clerk or bookkeeper or freight brakeman, which duties he was familiar with.

(Testimony of Dr. W. H. Greer)

DR. W. H. GREER,

a witness on behalf of the defendant, testified by deposition substantially as follows: That he had been practicing for thirty years; that he knew Walter Woodall having examined him for railroad service on September 10, 1920. He identified his report and stated it correctly represented his findings; that at the time of his examination he believed that the man was able to follow continuously a substantially gainful occupation.

CROSS EXAMINATION

On cross examination the doctor stated he was a surgeon for the Southern Railway Company at the time he made the examination. He admitted that the examinations were really incomplete physical examinations; stated that he made a physical examination, examined the heart and lungs with stethoscope, inspected the joints, examined the man for hernia; that the vision and hearing were within the requirements for the Southern Railroad service and passed him. His examination was to ascertain the condition of plaintiff's eyes and hearing, and whether he had fair use of his arms and hands; stated that the examination took about twenty minutes and that he formed his opinion as a result of the examination made as related by witness; stated that he did not know whether Woodall went to work or not.

(Testimony of Dr. W. H. Greer)

RE-DIRECT EXAMINATION.

On re-direct examination he stated that the lungs and heart were in good condition and he found no hernia.

RE-CROSS EXAMINATION.

That the examination of the lungs was made only with a stethoscope; no examination was made of the sputum; that the examination of plaintiff's lungs was not conclusive.

Both counsel for the plaintiff and counsel for the defendant then rested their cases.

Thereafter, on to-wit: June 30, 1933, the court made and entered its minute order as follows:

"Findings and judgment are ordered for the plaintiff against the defendant pursuant to the prayer of plaintiff's complaint and in accordance with written memorandum of conclusions of the court. Filed herein this day.

"Messrs. Volney P. Mooney and Sylvester Hoffm*an* are allowed ten per cent of the amount of recovery by plaintiff as attorneys fees herein. Exception noted and allowed to defendant." Dated at Los Angeles, California, June 30, 1933.

Thereafter and on September 5, 1933, the following stipulation was filed together with the defendant's Proposed Findings of Fact and Conclusions of Law:

"IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

WALTER WOODALL,	)	
PLAINTIFF	)	No. 4247 M.
VS	)	STIPULA-
UNITED STATES OF AMERICA	)	TION.
DEFENDANT	)	

IT IS HEREBY STIPULATED by and between Walter Woodall, Plaintiff, Volney P. Mooney, Jr. and Sylvester Hoffman, his attorneys and defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said district, that the hereunto attached Defendant's Proposed Findings of Fact and Conclusions of Law may be filed nunc pro tunc as of the 7th day of July, 1933, and prior to the entry of judgment in the above entitled action; that defendant's objection to the approval of plaintiff's proposed Findings of Fact and Conclusions of Law and the entry of Judgment thereon and exception noted to the ruling of the Court thereon may be entered nunc pro tunc as of said 7th day of July, 1933, and that an except-

tion may be noted, nunc pro tunc as of July 7, 1933, to the ruling of the Court refusing to accept Defendant's Proposed Findings of Fact and Conclusions of Law.

Dated September 5th, 1933.

VOLNEY P MOONEY JR
Volney P Mooney Jr.
SYLVESTER HOFFM*AN*
Sylvester Hoffm*an*
Attorneys for Plaintiff

PEIRSON M HALL
United States Attorney
By CLYDE THOMAS
Assistant United States Attorney

IT IS SO ORDERED:

PAUL J McCORMICK
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL	)	NO. 4247 M.
Plaintiff	)	DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.
vs	)	
UNITED STATES OF AMERICA	)	
Defendant	)	

This matter came on regularly for trial on May 31, 1933, before the Honorable Paul J. McCormick, one of the judges of the above entitled court, trial by jury having been waived in writing by both the parties, plaintiff appearing in person and by his counsel, Volney P. Mooney, Jr., and Sylvester Hoffman, of counsel, and the defendant appearing by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and Dustin Gustin, of counsel and evidence, both oral and documentary, having been introduced, and the cause having been heretofore submitted to the court for its decision, and the court having been fully informed in the premises, and having considered the law and the evidence, now makes its Findings of Fact as follows:

I.

That it is true that the plaintiff, Walter Woodall, is a citizen of the United States of America, and at the time

of the commencement of this action was and now is a resident of Los Angeles County, State of California.

II.

That it is true that the plaintiff, Walter Woodall, enlisted in the armed forces of the United States on the 31st day of December, 1917, and that he served in said armed forces from said date up to and including the 11th day of September, 1919, when he was honorably discharged from said service; that during all of said times, he was employed exclusively in the active service of the Army of the United States.

III.

That while in the said Army of the United States of America, plaintiff applied for and was granted War Risk Insurance in the sum of $5,000.00; that there was thereafter issued to him a certificate of War Risk Insurance and that there was deducted from his pay all premiums due on said War Risk Insurance up to and including the month of December, 1919, and that said War Risk Insurance lapsed for non-payment of premium on the first day of February, 1920.

IV.

That plaintiff did not become totally disabled prior to the first day of February, 1920, from tuberculosis, or any other disability, and did not become permanently disabled prior to the said first day of February, 1920, from tuberculosis or any other disability.

V.

That a disagreement exists between the plaintiff and defendant.

CONCLUSIONS OF LAW.

From the above findings of Fact, the Court makes the following Conclusions of Law:

That the plaintiff, Walter Woodall, is not entitled to recover anything by his complaint and the defendant is entitled to a judgment, that plaintiff take nothing, and defendant be awarded its costs.

Dated this day of , 1933.

.....

United States District Judge.

Approved as to form as provided by Rule 44:

VOLNEY P MOONEY JR

By.....

Attorneys for Plaintiff.

The above Proposed Findings of Fact and Conclusions of Law are rejected and denied and an exception noted to the defendant as of the 7th day of July, 1933, the time which judgment was entered in the above entitled case, and the Clerk directed to enter such order as if made at that time.

Dated this day of 1933.

.....

United States District Judge.

That the time to settle and file the bill of exceptions has been extended by leave of court to March 30, 1934, by the Honorable Paul J. McCormick, United States District Judge.

That the foregoing is all of the evidence received in said cause and the defendant, the United States of America, prays that the same may be allowed, settled, signed and sealed by the Honorable Judge before whom the case was tried, pursuant to the statute in such case made, to be filed and made part of the record herein, which is done accordingly this 30 day of March 1934, which is within the time heretofore granted by the Court for the presenting and filing of the said bill of exceptions herein.

IT IS HEREBY STIPULATED by and between counsel by the respective parties in this cause that the foregoing bill of exceptions is a full and correct copy of all of the evidence offered and receive at the trial thereof.

Dated this 30th day of March 1934.

Volney P Mooney Jr.
Volney P. Mooney, Jr.
Sylvester Hoffmann
Sylvester Hoffman
Attorneys for Plaintiff

and

Madison L Hill
For U. S. Attorney
Peirson M Hall
PEIRSON M. HALL
United States Attorney.
Hugh L. Dickson
HUGH L. DICKSON
Assistant United States Attorney
Madison L Hill
MADISON L. HILL,
Attorney, Department of Justice.
Attorneys for Defendant.

The ABOVE AND FOREGOING BILL OF EXCEPTIONS IS SETTLED AND ALLOWED HEREBY:

Geo. Cosgrave

United States District Judge in place of Judge McCormick, who is out of Judicial District.

[Endorsed]: No. 4247 M In the District Court of the United States for the Southern District of California Central Division Walter Woodall Plaintiff, vs. United States of America, Defendant. BILL OF EXCEPTIONS. Filed Mar 30 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	No. 4247-M
vs.	)	STIPULA-
	)	TION
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, through their respective counsel, that the Bill of Exceptions may be settled and signed by any United States District Judge in the absence of the Hon. Paul J. McCormick.

Dated: March 29th, 1934.

VOLNEY P. MOONEY, JR.
Attorney for Plaintiff

By Sylvester Hoffmann
Sylvester Hoffmann
Of Counsel

PEIRSON M. HALL,
U. S. Attorney

By: .....
Assistant U. S. Attorney

Madison L. Hill
Madison *B.* Hill
Attorney, Dept. of Justice
Attorneys for Defendant

[Endorsed]: No. 4247-M In the United States District Court in and for the Southern District of California Central Division Walter Woodall, Plaintiff, vs. United States of America, Defendant. STIPULATION Filed Mar 30 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Volney P. Mooney, Jr. Attorney at Law 818 Chester Williams Building 215 West Fifth street, Los Angeles Phone MUtual 8208 Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4247-M
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Jack L. Powell, Assistant United States Attorney for said District, and good cause appearing therefor;

IT IS ORDERED that the time within which the Defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including October 7, 1933;

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including October 7, 1933.

DATED: July 18, 1933.

Wm. P. James
United States District Judge.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff, vs. United States of America, Defendant. ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM. Filed Jul 18 1933 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4247-M
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including January 15, 1934;

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this court is hereby extended to and including January 15, 1934.

DATED: October 7th, 1933.

Paul J. McCormick
United States District Judge.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff vs. United States of America, Defendant ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM. Filed Oct 7-1933 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL	)	
	)	
Plaintiff	)	
	)	
-vs-	)	No. 4247-M
	)	
UNITED STATES OF AMERICA	)	
	)	
Defendant	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM

On Motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Madison L. Hill, Attorney, Department of Justice for said District, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including February 15, 1934;

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this court is hereby extended to and including February 15, 1934.

DATED: JANUARY 8, 1934

Frank H. Kerrigan
United States District Judge.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall Plaintiff vs. United States of America Defendant ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM Filed Jan 8-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	No. 4247-M
	)	
Plaintiff,	)	ORDER
	)	EXTENDING
vs.	)	TIME WITHIN
	)	WHICH TO
UNITED STATES OF AMERICA,	)	SERVE AND
	)	FILE BILL OF
Defendant.	)	EXCEPTIONS.

On motion of Hugh L. Dickson, Assistant United States Attorney for the Southern District of California, and Madison L. Hill, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions is hereby extended to and including March 30th, 1934.

IT IS FURTHER ORDERED that for the purpose indicated and for the purpose of perfecting the appeal in this case, the term is extended to and including March 30th, 1934.

Dated: February 6, 1934.

Paul J McCormick
United States District Judge.

[Endorsed]: No. 4247-M In the District Court of the United States for the Southern District of California Central Division Walter Woodall, Plaintiff, vs. United States of America, Defendant. ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS. Rec copy this 7th day of Feb. 1934—Volney P. Mooney, Jr. By M S. Atty for Plaintiff Filed Feb 7-1934 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	No. 4247-M
	)	
- vs -	)	PETITION
	)	FOR APPEAL
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

TO: HONORABLE PAUL J. McCORMICK, Judge of the above entitled Court.

Comes now the defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District and feeling itself aggrieved by the Judgment entered in this cause, hereby prays that appeal may be allowed, to-wit: From the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the 9th Circuit, and in connection with this

Petition, petitioner hereby presents its Assisgnment of Errors.

Dated October 6th 1933.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff, vs. United States of America, Defendant. PETITION FOR APPEAL Filed Oct 7-1933 R. S. Zimmerman, Clerk By L Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	No. 4247-M
- vs -	)	
	)	ASSIGNMENT
UNITED STATES OF AMERICA,	)	OF ERRORS
	)	
Defendant.	)	

The defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, in connection with Petition for Appeal, files the following Assignment of Errors upon which it will rely in presenting the appeal in this cause from a Judgment entered herein on the 7th day of July, 1933.

I

That the District Court erred in making and entering its finding No. 5, as follows:

"5. That it is true that while serving the defendant as aforesaid and prior to the date of the honorable discharge of plaintiff as aforesaid mentioned, plaintiff here-

in contracted certain diseases, injuries and disabilities resulting in and known as pulmonary tuberculosis, gall bladder disabilities and other disabilities."

II.

That the District Court erred in making and entering its finding No. 6 as follows:

"6. That it is true that under the provisions of the said Act and other Acts amendatory thereof, hereinbefore described and under and by virtue of the terms of the policy of insurance issued by defendant herein to plaintiff, plaintiff is entitled to the payment of the sum of $28.75 for each and every month that he may be permanently and totally disabled."

III

That the District Court erred in making and entering its finding No. 7 as follows:

"That it is true that said diseases, injuries and disabilities, have continuously since the month of November, 1919, rendered and still do render plaintiff, Walter Woodall, wholly unable to follow continuously any substantially gainful occupation; that such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in the same or greater degree so as to prevent him from following continuously any substantially gainful occupation. That plaintiff has been ever since the month of November, 1919,

and still is totally and permanently disabled by reason of and as a direct and proximate result of such disabilities above set forth."

IV

The District Court erred in making and entering its finding No. 11 as follows:

"11. That it is true that the aforesaid policy of war risk term insurance was in full force and effect during the month of November, 1919, the date upon which the plaintiff was and became and ever since has been permanently and totally disabled for insurance purposes."

V

The District Court erred in making and entering its Conclusion of Law No. 1 as follows:

"1. That the insured, to-wit: the plaintiff, Walter Woodall, became permanently and totally disabled during the month of November, 1919, and while said $5,000.00 policy of war risk term insurance was in full force and effect, and that at all times from and after said month of November, 1919, the plaintiff was, ever since has been and now is totally and permanently disabled."

VI

That the Court erred in making and entering its Conclusion of Law No. 2 as follows:

"2. That the plaintiff herein is entitled to recovery from the defendant, United States of America, in accordance with the said war risk term insurance contract

and the laws applicable thereto, monthly installments in the sum of $28.75 each for each and every month commencing with the month of November, 1919, and continuously thereafter as long as he lives and continues to be permanently and totally disabled."

VII

That the District Court erred in making and entering herein its Judgment for the plaintiff.

VIII

That the District Court erred in denying Findings of Fact and Conclusions of Law as proposed by the defendant.

IX

That the District Court erred in failing and refusing to find as proposed by defendant that plaintiff did not become totally disabled prior to the 1st day of February 1920 from tuberculosis, or any other disability, and did not become permanently disabled prior to the said 1st day of February 1920 from tuberculosis or any other disability.

X

That the District Court erred in failing and refusing to make and enter its Conclusions of Law that the plaintiff, Walter Woodall, is not entitled to recover anything by his complaint and the defendant is entitled to a judgment, that plaintiff take nothing, and defendant be awarded its costs.

XI

That the District Court erred in denying defendant judgment as proposed by the defendant.

XII

That the District Court erred in denying defendant's Motion for Judgment at the conclusion of the evidence.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff vs. United States of America, Defendant ASSIGNMENT OF ERRORS Filed Oct 7-1933 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL,	)	
	)	
Plaintiff,	)	No. 4247-M
	)	
- vs -	)	ORDER
	)	ALLOWING
UNITED STATES OF AMERICA,	)	APPEAL
	)	
Defendant.	)	

IT IS HEREBY ORDERED that the appeal prayed for in the Petition for Appeal filed in the above entitled cause be allowed.

Dated October 7th 1933.

Paul J McCormick
United States District Judge

[Endorsed]: No. 4247-M District Court of the United States Southern District of California Central Division Walter Woodall, Plaintiff vs. United States of America, Defendant. ORDER ALLOWING APPEAL Filed Oct 7-1933 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	
	)	
–vs–	)	No.
	)	
WALTER WOODALL,	)	
	)	
Appellee,	)	

ORDER ALLOWING ORIGINAL EXHIBITS TO BE FORWARDED TO THE CIRCUIT COURT OF APPEALS ON REVIEW IN LIEU OF INCORPORATION IN TOTO IN THE RECORD

It is hereby ordered that, subject to the approval of the Justices of the United States Circuit Court of Appeals, the original exhibits offered in evidence at the trial of the above-entitled cause in this court and consisting mainly of medical examinations from the files and records of the United States of America, be forwarded to the Circuit Court of Appeals with the record to save the expense of setting forth the same in detail in the record and to save the volume thereof.

(Signed) Paul J. McCormick.
United States District Judge.

APPROVED:

(Signed) Volney P. Mooney, Jr.
Attorney for Plaintiff.

GOOD CAUSE appearing therefor, it is ordered that the original exhibits in the above-entitled cause may be

submitted to this court in lieu of being printed in hec verba in the record.

(Signed) Curtis D. Wilbur
United States Circuit Judge

[Endorsed]: Filed May 17, 1934, Paul P. O'Brien, Clerk.

[Endorsed]: Filed May 18 1934 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

WALTER WOODALL	)	
	)	No. 4247-M
Plaintiff	)	
	)	PRAECIPE
-vs-	)	FOR
	)	TRANSCRIPT
UNITED STATES OF AMERICA	)	OF RECORD
	)	
Defendant	)	

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a Transcript of the Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal filed and allowed in the above entitled cause, and to in-

clude in such Transcript of Record the following papers and exhibits, to-wit:

1. Complaint
2. Answer
3. Stipulation Waiving Jury.
4. Minutes of Trial May 31, 1933
5. Minute Order of June 30, 1933
6. Memorandum Opinion of the Court filed June 30, 1933
7. Order extending Time Within Which to Serve and File Bill of Exceptions and Extending Term dated July 18, 1933,
8. Findings of Fact and Conclusions of Law
9. Judgment
10. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term dated October 7, 1933
11. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term dated January 8, 1934
12. Order Extending Time Within Which to Serve and File Bill of Exceptions dated February 6, 1934
13. Order Extending Time in Which to Docket Cause dated February 6, 1934
14. Bill of Exceptions
15. Plaintiff's Exhibit #'s 1 to 22 inclusive
15. Defendant's Exhibit 'A'.
16. Appeal papers, consisting of:
    A. Petition for Appeal
    B. Order Allowing Appeal

C. Assignment of Errors
D. Praecipe for Transcript of Record
E. Citation on Appeal
F. Clerk's Certificate to record

Said Transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, on or before the day of , 1934

DATED:

Peirson M Hall
PEIRSON M. HALL
United States Attorney
Hugh L Dickson
HUGH L. DICKSON
Assistant United States Attorney
Madison L Hill
MADISON L. HILL
Attorney, Department of Justice
Attorneys for Defendant

[Endorsed]: No. 4247-M In the District Court of the United States for the Central Division of the Southern District Walter Woodall Plaintiff vs. United States of America Defendant PRAECIPE FOR TRANSCRIPT OF RECORD Received Copy of within Praecipe this 20th day of March, 1934 Volney P Mooney, Jr. attorney for pltff. Filed Mar 30 1934 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

WALTER WOODALL,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 108 pages, numbered from 1 to 108 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; stipulation waiving jury; minutes of the trial of May 31, 1933; minute order of June 30, 1933; memorandum opinion; findings of fact and conclusions of law; judgment; bill of exceptions; orders extending time and term to file bill of exceptions;

petition for appeal; assignment of errors; order allowing appeal; a copy of the order allowing original exhibits to be forwarded to the Circuit Court of Appeals in lieu of incorporating the same in the record as called for in the praecipe, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-eighth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7494.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

United States of America,
Appellant,

vs.

Walter Woodall,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

VOLNEY P. MOONEY, JR.,
SYLVESTER HOFFMANN,
Chester Williams Bldg., 215 W. 5th St., L. A.,
Attorneys for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTES.

Text Books and Encyclopedias.

No. 7494.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

United States of America,
Appellant,

vs.

Walter Woodall,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant's "Statement of the Case" is controverted by appellee, said statement being both inaccurate and not sufficiently complete to present either "the questions involved" or "the manner in which they are raised" (Rule 24, C. C. A. 9).

Walter Woodall, the appellee (hereinafter called plaintiff) on November 5, 1930 [R. 9] filed his complaint in the District Court against the United States, the appellant (hereinafter called defendant), upon a contract or policy of war risk insurance.

He alleged that while said contract or policy was in full force, to-wit: in November, 1919, he became, ever since has been and now is totally and permanently disabled by reason of "pulmonary tuberculosis, gall bladder disabilities and other disabilities." [R. 4-8.]

The defendant joined issue [R. 10-11] and the cause was tried before the Honorable Paul J. McCormick, District Judge, on May 31, 1933, sitting without a jury. [R. 14.]

At the close of plaintiff's case, the defendant made a motion for judgment on the ground that plaintiff had failed to establish total and permanent disability from the time the policy was in force, which motion was denied without prejudice; no exception was taken to that ruling. [R. 64.]

The defendant thereupon presented its evidence [R. 65 *et seq.*] and both parties rested. [R. 17.] The case was taken under submission by the trial court the same day, *e. g.*, May 31, 1933. [R. 17.]

On June 30th, 1933, the court made and entered general findings for plaintiff, pursuant to the prayer of his complaint. [R. 18, 79.] On July 7th, 1933, the court signed and filed special findings and conclusions of law in favor of plaintiff [R. 21-26] and judgment for plaintiff was signed, filed and entered on that day. [R. 27-29.] On September 5, 1933 (or 62 days thereafter) defendant filed it's Proposed Findings of Fact and Conclusions of Law [R. 82-84] pursuant to a stipulation [R. 80] and on

that day the trial judge ordered that the same be filed *nunc pro tunc* as of July 7, 1933, and prior to the entry of said judgment; that an exception be noted *nunc pro tunc* as of that date to the ruling of the court refusing to accept defendant's said proposed special findings and it's proposed conclusions, and that defendant's objection to the approval of plaintiff's proposed special findings and conclusions and the entry of judgment and exception noted to the ruling of the court thereon be entered *nunc pro tunc* as of said date. [R. 80.] No objections were made, in fact, nor were any grounds assigned in support of such objections, by defendant, and no other requests for a declaration of law made by defendant during the progress of the trial.

No exceptions were taken to any ruling of the trial court during the progress of the trial.

Thereafter, defendant's petition for appeal [R. 97-98] and assignment of errors [R. 99-103] were duly filed and the appeal allowed. [R. 104.]

QUESTIONS PRESENTED.

(1) Must the judgment of the trial court be affirmed, in view of the state of the record?

(2) Is there any substantial evidence to support the finding that plaintiff was totally and permanently disabled from and after November, 1919?

PERTINENT STATUTES.

In addition to those set forth in the brief of appellant, appellee offers the following additional statutes:

Sec. 700 R. S. (28 U. S. C. A. 875):

> "When an issue of fact in any civil cause in a District Court is tried and determined by the court without the intervention of a jury, according to section 773 of this title (R. S. 649), the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Sec. 649 R. S. (28 U. S. C. A. 773; Comp. St. Secs. 1587-1668):

> "Issues of fact in civil cases in any District Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The findings of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

SUMMARY OF THE EVIDENCE.

There is no controversy relating to the following facts: plaintiff enlisted December 31st, 1917, and was discharged September 11th, 1919; that he applied for and was granted a contract of war risk insurance during the month of January, 1918, in the sum of $5,000.00, and premiums were paid thereon up to and including the month of December, 1919, which, with the grace period of thirty-one days, finally lapsed the contract at midnight January 31, 1920. [R. 31.]

Plaintiff was thirty-three years of age at the time he enlisted in the United States Navy, and prior thereto had lost no time from illness or sickness. He was assigned to the U. S. S. "Roanoke" which was engaged in laying mines in the North Sea. He passed coal from the bunkers to the firemen where the air was dense and no ventilation was provided. The ship used soft coal. He also helped in coaling the ship when it entered port. At one time he worked fourteen hours steadily without relief. The boiler room was extremely hot; he would strip to the waist and then stand under the single ventilator provided where the air was very cold. He got frequent colds and had stomach trouble with pains, would get tired and cough, and appeared to the ship's doctor on numerous occasions for treatment. The place where he slept was poorly ventilated. [R. 36-37.]

At the time he was discharged he still had a tired feeling and coughed; the cold stayed with him all of the time; he had pains in his stomach, his right side was sore and he intermittently was constipated and had diarrhoea and sour belches. [R. 37.]

At the time he was examined at discharge he did not strip. The doctors asked him if he felt alright and he wanted to be discharged so he said he did. [R. 37.]

Immediately after his discharge he went to his home in Alabama and saw Dr. Evans who gave him medicine and treatment. His pains in his stomach, soreness in the right side and tired feeling, pain in the chest and coughing continued. [R. 38.]

Thereafter he went to work firing a stationary boiler with oil in Louisiana for a total term of six weeks; if he felt bad he would lay off and some one of the other men would work a double shift for him. [R. 38.]

He got worse and saw Dr. Rayford Hodges, at which time he was still having trouble with his stomach, pain in his right side, was tired and coughing and had a pain in his chest, and in June, 1920, he was operated on for gall bladder after which he returned home and Dr. Hodges treated him for some time. [R. 38.]

In September, 1920, he was employed by the Southern Railroad in Alabama as a switchman where he worked eleven days in September, fifteen days in October, twenty-one days in November, and fifteen days in December. (Pl. Ex. 4.) There was plenty of work he could have done but he felt tired, his stomach hurt and he had pains in the right side and in his chest; that during the days he worked, the other men helped him and during part of those days he was permited to rest, there being no work to do. He left because of his condition. [R. 39.]

He then went to Taft, California, at the suggestion of Dr. Hodges, where he was treated by Dr. Harrison M. Hawkins; while there his stomach bothered him a great

deal, he had a tired feeling, pains in the chest and diarrhoea. He then went to the Veterans' Administration Hospital at Sawtelle where he was told he had tuberculosis and was sent to the tuberculosis hospital. He received vocational training in 1922: he went to school and studied reading, writing and arithmetic, and was then given training in undertaking and embalming for six or eight weeks but was discharged because he couldn't do the light work that was required. [R. 40.]

He returned to Alabama and in 1923 he worked for one month for the Southern Railroad Company, for about one-third of the time; from there he went to the Illinois Central Railroad where his friends helped him a great deal and would allow him to sit down and rest and did much of the work for him; he was too tired and not able to work and would "give out" and was forced to leave that employment after three or four months. [R. 40.]

He then went to a Government Hospital for an operation and then for about two to three months he tried to sell shirts on a commission working two or three hours with rest periods between, and made between $30.00 and $40.00 per month. [R. 40.]

He heard that Honduras was a good climate for tuberculosis and that living was cheap so he went there at the end of 1924 or the first part of 1925 and stayed there for two years, where he was treated by native doctors and an American doctor. During that time he worked for the United Fruit Company at two periods; once for two months and again a year later for three months; the work was light and he was allowed to lay down and rest in the caboose; and although he could have worked full time, because of his condition he didn't work more than two

days a week during those periods. The doctors at Honduras told him to go to a hospital so he returned to New Orleans but there were no beds so he returned to California and entered the hospital at Sawtelle in 1927 where he remained until 1928. [R. 41.]

In January or February, 1928, he was examined by Dr. Marvel Beem, at which time he was having pains in his stomach, sour belches, pains in his side and a tired feeling. The United States Veterans' Administration sent him to the Naval Hospital at San Diego in 1928; when he was discharged he returned to Alabama and in 1929 and was hospitalized in North Carolina. [R. 42.]

Plaintiff testified that his medical records in the Navy were not correct. That on his trip to California in 1927 he worked for six days for the K. C. M. & O. Railroad to get enough money to go to California. [R. 46-47.]

His testimony regarding his condition in 1922 was substantiated by a disinterested witness, Ray DeSpain [R. 31-32] and the crowded condition of the U. S. S. "Roanoke", the poor ventilation, long hours and working conditions generally for the plaintiff were corroborated by John F. Newsbaum. [R. 33-36.]

Dr. Rayford Hodges testified that he had known the plaintiff for thirty-five or thirty-six years and first treated him professionally in June or July, 1920, and off and on during the summer of that year, at which time the plaintiff complained of a cough, bronchial condition, pain in his chest, pain in the liver and gall bladder, and the doctor found him with bronchial rales, chronic hacking cough, pain in the region of the gall bladder with tenderness and gall bladder tumor: he told plaintiff that he believed plain-

tiff had tuberculosis. Dr. Hodges gave his opinion that the plaintiff was totally and permanently disabled at the time he first treated him in 1919. [R. 48.]

Dr. R. R. Bridges testified he first treated plaintiff in the Fall of 1923 and the plaintiff told him he was short of breath, had night sweats, afternoon temperature and inability to work and he made a diagnosis of pulmonary tuberculosis; that the plaintiff was totally and permanently disabled in 1923 when he first saw him and he believed the plaintiff had a lung condition prior to that date but he could not say how far back. [R. 49-51.]

Dr. Marvel Beem testified he examined plaintiff in January, 1928, and made a diagnosis of a disease of the gall bladder, to-wit: empyema, stone in the gall bladder and chronic gall bladder trouble. That severe pains in the stomach and vomiting, frequent pains in the side and diarrhoea and constipation, which are the symptoms plaintiff described he had in 1918, 1919 and 1920, would be related to the gall bladder, and it was significant that after the gall bladder of the plaintiff was removed in 1920, the condition continued with a yellowish color of the skin; such a condition permits bacteria and poison to go through the system and affects the resistance of the body to other diseases, including tuberculosis; that a tubercular condition of the intestines might have been present; that the fact that the records show that plaintiff had a gangrenous appendix in April, 1922, might be related to the gall bladder trouble. [R. 52-56.]

Dr. Harry Cohn testified that he has specialized in diseases of the chest for twenty years, was a tuberculosis specialist employed by the Government and now in private practice, and Director of the Division of Tuberculosis of

Los Angeles City Health Department; he testified that in his opinion the plaintiff was totally and permanently disabled from some time prior to the 1st day of January, 1920; that the presence of the stomach and intestinal disorders made the curability of the tuberculosis unfavorable; that he disagreed with the opinions of the doctors employed by the defendant that the tuberculosis ever had become "arrested" in the case of the plaintiff; that in many cases of advanced tuberculosis the condition is not discovered until after X-rays are made of the chest although the patient may be apparently well; that plaintiff had tuberculosis for several years before it was discovered; that he had some tuberculosis when he was in the Navy and the conditions under which he worked aggravated the same so that he became totally and permanently disabled sometime prior to his discharge. That the fact that the plaintiff was also suffering from stomach disorders which were acute and regarded as symptoms, the tendency would be for the examining physician and the patient himself to concentrate on his abdomen rather than on his chest. That the disease had been spreading throughout both lungs ever since discovery in 1920; that the age of the plaintiff had an effect on the probability of cure. [R. 58-62.]

Dr. Harrison M. Hawkins testified that he examined plaintiff in April or May of 1921 and he had an infection of the bowels and some disturbance of the gall bladder; he was badly fatigued, considerably emaciated and in a great deal of distress and that he was too weak physically to follow any occupation at the time. [R. 62-63.]

ARGUMENT.

I.

THE JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED IN VIEW OF THE STATE OF THE RECORD.

II.

THERE IS SUBSTANTIAL EVIDENCE WARRANTING A FINDING THAT THE INSURED BECAME PERMANENTLY AND TOTALLY DISABLED WHILE THE INSURANCE WAS IN EFFECT.

Since the appellee urges that there is nothing for this court to consider, upon this appeal, and the judgment should be affirmed, we shall develop his first argument before answering that of the appellant.

I.

The Judgment of the Trial Court Must Be Affirmed in View of the Status of the Record.

A.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE EVIDENCE UPON WHICH THE JUDGMENT OF THE TRIAL COURT IS BASED.

This court in the case of *United States v. Yamoto* (C. C. A. 9), 50 Fed. (2d) 599, at page 600, speaking on this subject says:

> "There being no waiver either in writing or by stipulation in open court as provided by the above section (referring to section 649, Revised Statutes, as amended by the Act of May 20, 1930, 46 Statutes at Large, Part I, page 486) this court's jurisdiction to

review the proceedings of the trial court is limited to the process, pleadings and judgment. . . . This court being without jurisdiction to review the evidence upon which the judgment of the trial court is based, the judgment must be affirmed."

Such has been the repeated ruling of this court:

Graver Corp. v. Hercules Gasoline Co., (C. C. A. 9), 16 F. (2d) 459;

National Surety Co. v. United States (C. C. A. 9), 17 F. (2d) 372;

Kennedy v. United States (C. C. A. 9), 44 F. (2d) 57;

White v. United States (C. C. A. 10), 48 F. (2d) 178 (War Risk Ins. case).

Appellant takes no exception to the sufficiency of the pleadings, nor that the pleadings and the findings of the trial court do not support the judgment.

B.

JURY WAIVER MAY NOT BE CONSIDERED UNLESS INCLUDED IN THE BILL OF EXCEPTIONS.

The waiver of a trial by jury not being a part of the strict record or judgment-roll, it must be included in the Bill of Exceptions to be considered by a reviewing tribunal.

Clements, etc. v. Coppin, etc. (C. C. A. 9), 72 F. (2d) 796;

Beach v. United States (C. C. A. 9), 35 F. (2d) 837;

Reynolds v. United States (C. C. A. 9), 67 F. (2d) 216;

Hence, in view of the status of the record, there is nothing before Your Honors to review.

Palmer v. Acolian Co., 46 F. (2d) 746 (C. C. A. 8, certiorari denied 51 S. Ct. 560, 283 U. S. 851, 75 L. Ed. 1458);

James-Dickinson Farm Mtg. Co. v. Seimer, 12 F. (2d) 772 (C. C. A. 7, certiorari denied).

C.

THE ONLY ISSUE WAS WHETHER THE PLEADINGS SUPPORT THE JUDGMENT.

If trial by jury has not been waived, "the case is, in effect, submitted to the (trial) judge as an arbitrator, and his findings of fact and rulings of law are conclusive on the parties, if the pleadings support his judgment. The only issue open to (the) appellants, therefore, is whether the pleadings support the judgment."

F. Carrera & Hermano v. Font, 70 F. (2d) 999, at p. 1001 (C. C. A.);

Campbell v. United States, 224 U. S. 99, 105, 32 S. Ct. 398, 56 L. Ed. 684.

D.

APPELLANT MADE A MOTION FOR NON-SUIT AT THE CLOSE OF PLAINTIFF'S CASE, WHICH WAS DENIED; NO EXCEPTION WAS TAKEN [R. 64]. APPELLANT THEN PRESENTED ITS EVIDENCE [R. 65 ET SEQ.], THEREBY WAIVING ANY ERROR TO SUCH RULING.

Modoc Co. Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 536;

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791, 792;

Washburn v. Douthit (C. C. A. 8), 73 F. (2d) 23 (decided October, 1934).

And as appellant made no motion for judgment at the close of the trial, on the ground of insufficiency of the evidence, the evidence cannot be reviewed by the appellate court.

Feather River Lumber Co. v. United States (C. C. A. 9), 30 F. (2d) 642.

E.

APPELLANT'S OBJECTIONS BELOW TO APPROVAL OF PLAINTIFF'S FINDINGS AND JUDGMENT WERE TOO GENERAL TO PRESENT THE SUFFICIENCY OF THE EVIDENCE, ON APPEAL.

Defendant (below) made a general "objection to the approval of plaintiff's proposed findings . . . and the entry of judgment thereon" [R. 80] but such a general exception is insufficient to present the sufficiency of the evidence to support the special findings.

Edwards v. Robinson (C. C. A. 9), 8 F. (2d) 726;

Southern Pacific Co. v. Johnson (C. C. A. 9), 8 F. (2d) 993;

Babbitt Bros. v. New Home Sewing Mach. Co. (C. C. A. 9), 62 F. (2d) 530 (concurring opinion of Judge Wilbur at p. 536);

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791;

Wear v. Imperial Glass Co. (C. C. A.), 224 F. 60, 63;

Mansfield Hardwood Lbr. Co. v. Horton (C. C. A.), 32 F. (2d) 851, 853;

Tramel v. United States (C. C. A.), 56 F. (2d) 142 (a War Risk Ins. case);

Greenway v. United States (C. C. A.), 67 F. (2d) 738 at 739 (a War Risk Ins. case decided November, 1933);

Denver Livestock Co. v. Lee (C. C. A.), 20 F. (2d) 531;

Columbia Pictures Corp. v. Lawton etc. Co. (C. C. A. 8), 73 F. (2d) 18 (decided, October, 1934).

In this case, appellant objected to the findings and conclusions generally, stating no grounds whatsoever [R. 80-81].

In the absence of an exception to the facts found on the ground that the special findings made by the court have no evidence to support them, and separately stating the exceptions to the conclusions of law drawn by the court from the facts found, the appellate court cannot review the decision of the trial court upon the merits.

Macomber v. Goldthwaite (C. C. A. 9), 22 F. (2d) 638, 640;

First National Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 222;

Maryland Casualty Co. v. Jones (C. C. A. 9), 35 F. (2d) 791;

First Nat. Pictures v. Robison (C. C. A. 9), 72 F. (2d) 37, 39 (decided July, 1934; rehearing denied);

State Life Ins. Co. v. Sullivan (C. C. A. 9), 58 F. (2d) 741, 744.

The purpose of limiting the review only where the question is raised by specific, direct, unambiguous objections, rather than on broad, "shot-gun" or "omnibus"

grounds, is to clearly afford the trial judge an opportunity for revising his ruling.

McDermott v. Severe, 202 U. S. 600, 610, 26 S. Ct. 709, 50 L. Ed. 1162;

U. S. v. United States F. & G. Co., 236 U. S. 512, 529, 35 S. Ct. 298, 303, 59 L. Ed. 696;

Atchinson, T. & S. Ry. Co. v. Nichols (C. C. A. 9), 2 F. (2d) 12, 13.

F.

APPELLANT'S REQUEST FOR DECLARATION OF LAW CAME TOO LATE.

Quoting from *"1934 Cumulative Supplement to Manual of Federal Appellate Procedure"* (2nd Ed.), by Paul P. O'Brien, Esq. (page 6):

> "A request for judgment, or for declaration of law, or for special findings of fact and conclusions of law, made after the case has been submitted, and the trial judge has announced his decision, but before formal judgment has been entered, comes too late and is not made 'during the progress of the trial' as required by Sec. 700 R. S. (28 U. S. C. A. Sec. 875). It is essential that such motion be made at or before the submission of the cause for decision, both in a case submitted upon an agreed statement of all the ultimate facts, as well as in cases tried by the court without a jury." (Citing cases.)

Your Honor's attention is directed particularly to the concurring opinion of Judge Wilbur in the *Babbitt Bros. v. New Home* case [62 F. (2d) 530], wherein he stated (p. 536):

> "Furthermore, the request for findings, even if otherwise sufficient to raise the question sought to be presented here, was made long after the trial was concluded and after the court had announced its decision, and therefore the failure of the court to find the facts in accordance with the findings proposed by the losing party would not be subject to review."

This rule was adopted by this court in the later case of *Continental Nat. Bank v. National City Bank* (C. C. A. 9), 69 F. (2d) 312, 317 (certiorari denied October 8, 1934).

In addition to the cases cited in Mr. O'Brien's admirable Supplement, this court so decided in the earlier case of *Edwards v. Robinson* (C. C. A. 9), 8 F. (2d) 726, at p. 727. In that case, no request for special or general findings was made until after the close of the case and not until 10 days after an adverse decision had been announced by the trial court.

In this appeal an almost identical condition exists [R. 79-81]. In *Edwards v. Robinson, supra,* this court held (page 727):

> "Under the circumstances, we are without jurisdiction to consider the sufficiency of the evidence to support the findings."
>
> *First Nat'l Bk. v. Philippine Refg. Corp.* (C. C. A. 9), 51 F. (2d) 218, at 219.

G.

THE TRIAL COURT WAS WITHOUT POWER TO INCORPORATE IN THE BILL OF EXCEPTIONS SUBMISSION OF THE PROPOSED SPECIAL FINDINGS NUNC PRO TUNC.

Whereas in this case a declaration of law was not requested during the trial and an exception saved, or special findings requested before judgment, the court had no power to incorporate in the bill of exceptions *nunc pro tunc* as of the time an exception should have been taken, one which in fact was not then taken. [R. 80-81.]

First Natl. Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 222.

This court, in the last above cited case, quoted with approval (p. 222) from *Insurance Co. v. Boon,* 95 U. S. 117, 126, 24 L. Ed. 395:

> " 'We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matters upon the record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. *A judge cannot afterwards allow one not taken in time. Could he allow it, the record would be made to speak falsely.*' (Italics yours.) . . .
>
> "It is clear from the foregoing that the question of the sufficiency of the evidence to justify the judgment cannot be reviewed by this court."

As this court has said, "they come too late if made after judgment, even though the trial judge after judgment, granted leave to make the request."

Continental Nat. Bank v. National City Bank (C. C. A. 9), 69 F. (2d) 312, 317 (and cases cited) (cert. denied Oct. 8, 1934).

H.

WHERE A COURT MAKES GENERAL FINDINGS AND ALSO SPECIAL FINDINGS, FAILURE TO MAKE OTHER OR DIFFERENT SPECIAL FINDINGS CANNOT BE REVIEWED AS ERRONEOUS.

The trial court made a general finding sufficient to support the judgment. [R. 18-20 and 79.] It also made special findings. [R. 21-25.]

Where the court not only makes a general finding, but also makes special findings of fact, the failure to make other or different special findings of fact requested by appellant cannot be reveiwed as erroneous, because the court, having exercised its discretion in favor of making a general finding, is not required to make any special findings whatever, and the mere fact that it does supplement its general findings by certain special findings, cannot require it to make other findings.

Babbitt Bros. Trading Co. v. New Home Mach. Co. (C. C. A. 9), 62 F. (2d) 530, 536 (concurring opinion of Judge Wilbur);

Rev. Stat., Sec. 649 (28 U. S. C. A. 773);

Meath v. Board of Mississippi Levee Comm., 109 U. S. 269, 3 S. Ct. 284, 27 L. Ed. 930;

British Queen Mining Co. v. Baker etc. Co., 139 U. S. 222, 11 S. Ct. 523, 35 L. Ed. 147;

Newlands v. Calaveras M. & M. Co. (C. C. A. 9), 28 F. (2d) 89;

Modoc Co. Bank v. Ringling (C. C. A. 9), 7 F. (2d) 535, 537;

U. S. v. Kelly (C. C. A. 5), 68 F. (2d) 312 (war risk case decided Jan., 1934);

Cross Co. v. Texhoma Oil etc. Co. (C. C. A. 8), 32 F. (2d) 442, 445.

Where the trial court refuses to approve special findings or to make a request for a declaration of law offered by the losing party after the case is tried, submitted and the decision announced (as in this case), the ruling of the trial court will not be disturbed upon appeal.

First Natl. Bank v. Philippine Refg. Corp. (C. C. A. 9), 51 F. (2d) 218, 221;

Denver Live Stock Comm. v. Lee (C. C. A. 8), 18 F. (2d) 11, 14 [rehearing denied 20 F. (2d) 531].

I.

WHERE A GENERAL FINDING IS MADE, REVIEW IS LIMITED TO THE RULINGS OF THE TRIAL COURT IN THE PROGRESS OF THE TRIAL. APPELLANT ASKED FOR NO RULINGS EXCEPT ON ITS MOTION FOR A NONSUIT.

Wulfsohn v. Russo-Asiatic Bank (C. C. A. 9), 11 F. (2d) 715.

J.

AN ALLEGED ERROR OF LAW CANNOT BE REVIEWED IN THE JURY WAIVED CASE.

All evidentiary facts were admitted except one issue of fact: that of permanent and total disability prior to mid-

night of January 30, 1920. [R. 30-31.] The alleged error of law, (if any) made by the court in finding for plaintiff on that one issue of fact, cannot be reveiewd.

Kunihiro v. Lyons Bros. Co. (C. C. A. 9), 12 F. (2d) 894 at 986 (rehearing denied; cert. denied, 47 S. Ct. 112).

K.

TRIAL COURT'S FINDINGS ON QUESTIONS OF FACT ARE CONCLUSIVE ON APPEAL.

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

[Verbatim from *Dooley v. Pease,* 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457, and cited with approval by this court in *Ocean A. & G. Corp. v. Rubin* (C. C. A. 9), 73 F. (2d) 157, 163, decided October, 1934.]

[1]To same effect, that no reversal will lie for errors of fact, in jury-waived case:

Continental Natl. etc. Co. v. Olney Nat. Bank (C. C. A. 7), 33 F. (2d) 437, 438;

Mission Marble Wks. v. Robinson etc. Co. (C. C. A. 9), 20 F. (2d) 14, 15;

Clements v. Coppin (C. C. A. 9), 61 F. (2d) 552, 557;

Porter Co. v. Java etc. Co. (C. C. A. 9), 4 F. (2d) 476, 477 (cert. denied 45 S. Ct. 515, 268 U. S. 697, 69 L. Ed. 1163).

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1. Rehearing pending.

II.

There Is Substantial Evidence to Support the Findings of Total and Permanent Disability While the Policy Was in Force.

A.

IN ANSWERING THE ARGUMENT OF APPELLANT, WE SUBMIT THAT THE DECISIONS QUOTED BY APPELLANT RELATING TO THE LONG DELAY IN BRINGING SUIT, ADD TO THE WEIGHT OF THE EVIDENCE ON BEHALF OF APPELLANT, BUT THAT THE WEIGHT OF THE EVIDENCE IS SOLELY UP TO THE TRIAL COURT.

U. S. v. Higbee (C. C. A. 10), 72 F. (2d) 773, 775.

"It is fundamental that this court must view the evidence in the light most favorable to the appellee, and must affirm the findings and conclusions of the trial court if they are supported by any substantial evidence."

U. S. v. Scarborough (C. C. A. 9), 57 F. (2d) 137;

U. S. v. Pentz (C. C. A. 9), 35 F. (2d) 350;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540;

U. S. v. Lesher (C. C. A. 9), 59 F. (2d) 53, 55;

U. S. v. Alger (C. C. A. 9), 68 F. (2d) 592, 593;

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743, 744;

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865.

This court must assume that the trial judge disbelieved witnesses whose testimony conflicted with its findings and judgment and believed those whose testimony supported

them, the court's judgment having the force and effect of a verdict of a jury.

Sec. 649, *R. S.* (28 U. S. C. A. 773);

Ford Motor Co. v. Pearson (C. C. A. 9), 40 F. (2d) 858;

Independence Indem. Co. v. Sanderson (C. C. A. 9), 57 F. (2d) 125;

Larsen v. Portland Calif. S. S. Co. (C. C. A. 9), 66 F. (2d) 326, 329.

B.

IN THE CASE AT BAR THERE WERE EXPERTS WHO STATED THAT IN THEIR OPINION THE PLAINTIFF'S DISABILITY WAS PERMANENT AND TOTAL ON THE DATE AT ISSUE.

Any conflict in opinions of expert witnesses and the weight to be given opinion evidence, are matters for the trial court and will not be reviewed on appeal.

U. S. v. Alger (C. C. A. 9), 68 F. (2d) 592, 593;

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865, 867;

U. S. v. Burleyson (C. C. A. 9), 64 F. (2d) 868, 872;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540, 541;

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743.

In the absence of an objection, it must be assumed that a doctor had sufficiently qualified as an expert.

Hardy v. Baker, 10 F. (2d) 277, 280.

Dr. Hodges [R. 48], and Dr. Bridges [R. 50], answered hypothetical questions put to them, but the bill of exceptions does not state the factual foundation included in the hypothetical question.

Consequently, their opinions cannot be assailed upon appeal and if accepted by the trial court, are sufficient in weight and credibility to support the judgment.

U. S. v. Francis (C. C. A. 9), 64 F. (2d) 865, 867.

The fact that a hypothetical question to an expert omitted necessary facts (if true) cannot be considered on appeal, where no objection was made, nor an exception taken and included in the assignment of errors.

U. S. v. Nickle (C. C. A. 8), 70 F. (2d) 873.

C.

THE MATTER OF ANY ALLEGED INCONSISTENCIES IN PLAINTIFF'S TESTIMONY, INCLUDING A STATEMENT OF NO DISABILITY AT DISCHARGE, AND THE WEIGHT TO BE GIVEN SUCH EVIDENCE, IS ENTIRELY WITHIN THE PROVINCE OF THE TRIAL COURT.

U. S. v. Dudley (C. C. A. 9), 64 F. (2d) 743;
U. S. v. Jensen (C. C. A. 9), 66 F. (2d) 19.

D.

PLAINTIFF FOLLOWED VOCATIONAL TRAINING FOR APPROXIMATELY SIX OR EIGHT WEEKS [R. 31] AND HAD TO GIVE UP ON ACCOUNT OF HIS HEALTH. SUCH A RECORD IS NOT CONCLUSIVE SINCE VOCATIONAL TRAINING, LIKE A WORK RECORD, IS FOR THE COURT TO PASS ON.

U. S. v. Jensen (C. C. A. 9), 66 F. (2d) 19.

E.

IN MEASURING THE QUANTUM OF EVIDENCE NECESSARY TO SUSTAIN A JUDGMENT, THE REMEDIAL PURPOSES OF THE WORLD WAR VETERANS ACT SHOULD BE CONSIDERED.

Sorvik v. United States (C. C. A. 9), 52 F. (2d) 406, 410 (and cases cited).

The plaintiff testified that he had only had a fifth grade country school education. [R. 39.] He tried to sell shirts but because of his lack of education and adaptability, and also because of his health, he was not able to make more than $30.00 to $40.00 per month working five or six hours a day and only followed this occupation for two or three months. [R. 40.]

As this court said in *Sorvik v. U. S.* (C. C. A. 9), 52 F. (2d) 406, 410, it is clear that Woodall, because of his educational limitations, was not equipped for office work; it is likewise clear that he made repeated manful efforts to earn his living in firing boilers and as a switchman, which were the only occupations he knew, but he had to give this up after short periods of time at each attempt,

because of the deleterious effect upon his health. Unlike the facts found in *Sorvik v. U. S., supra,* Woodall at all times could have obtained work; every time he did give up work it was not because of the lack of opportunity for employment but because of his physical condition.

Events subsequent to November, 1919, are, of course, vitally important in determining his condition prior to the time that the policy lapsed, for the effect of tubercle bacilli varies widely with the individual infected therewith and it is impossible to make a definite prognosis at the outset of the disease.

> *U. S. v. Thomas* (C. C. A. 10), 64 F. (2d) 245, 246.

The combination of the tuberculosis and the stomach ailments and the working conditions of Woodall bears favorably with those considered by this court in the case of *U. S. v. Meserve* (C. C. A. 9), 44 F. (2d) 549, except that the work record of Mr. Meserve was much more substantial than this plaintiff. While it is true that Mr. Meserve died in 1928, the Government of course makes no claim that a plaintiff must be dead in order to be permanently disabled, and has admitted permanent and total disability since March 20th, 1928. [R. 31.] In other words, the Government admits that Woodall was permanently disabled, and there is substantial evidence in the record to show that he was totally disabled at all times from November, 1919.

Total disability, of course, is not an abstract concept. It is not the same in all circumstances and under all conditions. It is a relative term, and whether it is present

in a particular case depends upon the peculiar facts and circumstances of that case. The problem of determining whether it exists in a given case is concrete and relative, not abstract.

U. S. v. Rasar (C. C. A. 9), 45 F. (2d) 545, 547.

The Government in its brief calls attention to the fact that Dr. Rayford Hodges testified on cross-examination (which is not binding on the plaintiff) that there were occupations which Woodall could have held down fairly well, where not much physical exertion or exposure was required [R. 49], and on direct examination testified that he could not do manual labor continuously [R. 48], but as this court said in *U. S. v. Rasar* (C. C. A. 9), 45 F. (2d) 545, at page 547, he had neither the education or training to qualify him for clerical work and it was not possible for him in his period of life to fit himself for it. His education and fitness was identical to that of Rasar.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, is recognized as one of the leading authorities on pulmonary tuberculosis [R. 67, 69] and has been so recognized by the Circuit Court of Appeal for the 10th Circuit [*U. S. v. Thomas*, 64 F. (2d) 245, page 246]. Dr. Fishberg states, as to the matter of arrest or whether a tuberculosis condition is arrested, depends on whether the patient remains in good condition for some time after returning to his old environment, without suffering a relapse of the constitutional symptoms; that improvement counts if it lasts without special treatment.

Fishberg, Pulmonary Tuberculosis, 1932 Edition, Vol. 2, page 247.

As the learned Dr. Fishberg further states (Vol. 2, p. 308):

"It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled.

"The notion that this disease is curable in its incipient stage is one of the medical half-truths which have gained universal credence because of tradition. There are so many exceptions as to almost nullify this ancient *dictum.* We have already shown that it is fallacious to classify phthisis (tuberculosis) into three or four stages, and to say, without reservation, that in the first stage it is curable; in the second stage the chances of recovery are considerably diminished, while in the third stage it is incurable.

"*There are incipient cases detected as early as is humanly possible which have no chance, irrespective of the treatment applied;* while there are many in the third stages whose chances of survival and even of efficiency are excellent.

"The elements of prognosis in phthisis (tuberculosis) reside in the following factors:

(1) The form of the disease;

(2) In a given form of the disease, the activity of the process as revealed by the constitutional symptoms and physical signs;

(3) The presence of complications;

(4) The extent of the lesion in the lungs;

(5) The economic condition of the patient."

An interesting discussion on tuberculosis will be found in *"Attorneys' Text Book of Medicine"* published in 1934,

by Roscoe N. Gray, M. D., Surgical Director, Aetna Life Insurance Company of Hartford, Conn., from which the following are excerpts:

> "The diagnosis of tuberculosis is difficult, because the disease may involve any part of the body, or many parts at once, leading to a great variety of symptoms. The disease thus simulates various medical and surgical conditions, frequently leading to errors in diagnoses sometimes leading to disastrous results. . . . The finding of tubercle bacillus is conclusive proof that infection is present. . . . Failure to identify the tubercle bacillus does not necessarily mean that tuberculosis is absent, since the organisms will only be liberated into the excretions when there is actual destruction of tubercular foci" (pages 441-442).

Speaking of X-ray studies of the lungs, Dr. Gray states:

> "Their interpretation necessitates the services of an expert. Contrary to popular belief, *it is not easy to determine whether tuberculosis is present or active, even with fairly good pictures of the lungs,* and many doctors overlook the disease, or declare the patient to be so infected when such is not true" (page 443).

Speaking of the symptoms at the inception of a chronic infection of the lungs, Dr. Gray states that the symptoms are usually very slight. In fact, that the majority of such cases are never recognized. The first usual symptoms are those indicative of an inflammation of the bronchi: the patient simply has a neglected cold, or one which is protracted. A tired feeling is frequent, leading to errors in diagnosis. Pain in the lungs may be the first finding and if present is of cardinal importance (page 446). Pain in the chest may be great or absent as symptoms of moder-

ately advanced tuberculosis. Cough is one of the commonest and most troublesome symptoms (page 447).

In the fibroid type of tuberculosis, which is also chronic, there is usually no temperature whatever or night sweats and the loss of weight is relatively slow. The patient complains of a cough and has a shortness of breath upon exertion (page 448).

> "Tuberculosis, the white plague" (says Dr. Gray), "is still one of the major causes of death, in spite of the tremendous sums spent annually in fighting this dread disease" (page 429).

In speaking of predisposing causes of the disease, Dr. Gray mentions that dust, confining work, long or irregular hours, are all factors leading to poor hygiene. That almost any diseased condition lowers the general vitality of the patient. This makes infection with the tubercle bacilli easy, and materially increases the likelihood of a dormant infection becoming active (page 435).

We see at once there is no hard fast rule with this disease; that stress and strain permit the dormant tubercle bacilli to spread and become active; that when complicated with diseases of the intestines and stomach and other complications, the prognosis is more doubtful; and that the determination of the onset of the disease and its totality must be viewed with the experience of the patient in attempting to follow his usual occupation with reasonable regularity.

And, lastly, that at least in the absence of such a work record as to conclusively negative such a finding, the question of total and permanent disability in tuberculosis cases

must necessarily be a matter of expert opinion, and within the sound discretion of the trial court.

Each of these cases must stand upon the particular facts in that case.

U. S. v. Rasar (C. C. A. 9), 45 F. (2d) 545.

It is submitted that there is sufficient evidence to support the findings and judgment:

U. S. v. Monger (C. C. A. 10), 70 F. (2d) 361;

U. S. v. Kane (C. C. A. 9), 70 F. (2d) 396;

U. S. v. Todd (C. C. A. 9), 70 F. (2d) 540;

U. S. v. Suomy (C. C. A. 9), 70 F. (2d) 542;

U. S. v. Anderson (C. C. A. 9), 70 F. (2d) 537;

U. S. v. Thomson (C. C. A. 10), 71 F. (2d) 860;

U. S. v. Bartlett (C. C. A. 9, No. 7408) (not reported yet);

U. S. v. Brown (C. C. A. 10), 72 F. (2d) 608;

U. S. v. Higbee (C. C. A. 10), 72 F. (2d) 773.

Conclusion.

It is therefore respectfully submitted that in view of the evidence in favor of the plaintiff, and further in view of the state of the record, the judgment should be affirmed.

VOLNEY P. MOONEY, JR.,
SYLVESTER HOFFMANN,
Attorneys for Appellee.

No. 7494

In the United States Circuit Court of Appeals for the Ninth Circuit

20

UNITED STATES OF AMERICA, APPELLANT

vs.

WALTER WOODALL, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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CITATIONS

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

Walter Woodall, appellee, hereinafter called plaintiff, brought suit against the United States, appellant, hereinafter called defendant, on a contract of War Risk Term Insurance in the amount of $5,000.00. The complaint (R. 4-9) alleged maturity of the contract by total permanent disability from and after November 1919 as a result of pulmonary tuberculosis, gall bladder trouble, and other disabilities. The answer (R. 10-11) joined issue on the allegation of total permanent disability.

The case was tried on May 31, 1933, before the Court and without a jury. Plaintiff's service record showed no sickness or medical treatment ex-

cept for chancroid during his service in the Navy from December 31, 1917, to September 11, 1918 (Pltf's. Ex. 2). There was no direct medical testimony of plaintiff's condition prior to June 1920, at which time he had an operation for gall-bladder trouble (R. 38).

Dr. Hodges testified from memory concerning an examination he had made in June 1920, that "as best he could remember" he made a diagnosis "as best he could under the circumstances" of "gall-bladder trouble with possible gallstones or inflamed chronic bronchitis, severe", and suspected tuberculosis (R. 47–48). Repeated examinations between June 1920 and August 2, 1921, when active tuberculosis was first diagnosed, revealed the following findings:

> August 20, 1920 (R. 73–74): No abnormality except operative scar which was "getting along all right" (R. 73). Plaintiff complained of no symptoms except recent operation.
>
> September 10, 1920 (R. 78): Plaintiff passed physical examination for employment with Southern Railroad. His heart and lungs were found to be in good condition (R. 78).
>
> April or May, 1921 (R. 62–63): Plaintiff appeared fatigued and emaciated with infection of bowels and gall-bladder disturbance which should clear up after treatment.
>
> June 14, 1921 (Pltf's. Ex. # 8): Heart, lungs, and abdomen negative.

After the diagnosis of active tuberculosis an examination on July 7, 1922 (R. 65, Pltf's. Ex. # 22), revealed minimal tuberculosis, arrested and curable, and three succeeding examinations, October 13, 1922 (R. 68–69, Pltf's. Ex. # 12, 13), and April 10, 1923 (R. 76, 77, Pltf's. Ex. # 14, 15), showed tuberculosis moderately advanced, arrested, and that plaintiff was able to work. Dr. Cohn, plaintiff's witness, in response to a hypothetical question testified that plaintiff had been totally permanently disabled "from some time prior to the first day of January 1920" (R. 56). On cross-examination he stated he could not render an opinion as to the curability of the disease in 1920 (R. 58).

The lay evidence consisted principally of plaintiff's testimony that though he has worked for various short periods aggregating more than two years he has at times during and since service felt tired and that he has had a cough with pains in his chest and abdomen which have hampered him in some of his attempts to work. He testified that on four occasions he had passed a physical examination before being accepted for employment. There was other lay testimony to the effect that in the winter of 1922 and 1923 plaintiff was unable to do the work in an undertaking parlor where he was employed as an attendant as part of his Vocational Training. A detailed summary of the evidence is set out hereinafter at pages 9 to 18.

At the conclusion of all the evidence the defendant moved for entry of findings of fact, conclusions

of law and judgment in its favor (R. 82–84) and to the denial of this motion an exception was duly allowed (R. 84). Thereupon the Court ordered entry of findings and judgment for the plaintiff and against the defendant to which action by the Court defendant's exception was allowed (R. 79). On July 7, 1933, judgment was entered awarding plaintiff $28.75 for each month since November 1919 (R. 27–28). Defendant's petition for appeal (R. 97–98) and assignment of errors (R. 99–103) were duly filed and the appeal allowed (R. 104).

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or permanent and total disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, * * *

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled per-

son to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

QUESTION PRESENTED

Whether there was any substantial evidence that the plaintiff was totally permanently disabled from and after November 1919.

ASSIGNMENT OF ERRORS

I

That the District Court erred in making and entering its finding No. 5, as follows:

> 5. That it is true that while serving the defendant as aforesaid and prior to the date of the honorable discharge of plaintiff as aforesaid mentioned, plaintiff herein contracted certain diseases, injuries, and disabilities resulting in and known as pulmonary tuberculosis, gall bladder disabilities, and other disabilities (R. 99).

II

That the District Court erred in making and entering its finding No. 6, as follows:

> 6. That it is true that under the provisions of the said Act and other Acts amen-

datory thereof, hereinbefore described and under and by virtue of the terms of the policy of insurance issued by the defendant herein to plaintiff, plaintiff is entitled to the payment of the sum of $28.75 for each and every month that he may be permanently and totally disabled (R. 100).

III

That the District Court erred in making and entering its finding No. 7, as follows:

> 7. That it is true that said diseases, injuries, and disabilities, have continuously, since the month of November 1919, rendered and still do render plaintiff, Walter Woodall, wholly unable to follow continuously any substantially gainful occupation; that such diseases, injuries, and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in the same or greater degree so as to prevent him from following continuously any substantially gainful occupation. That plaintiff has been ever since the month of November 1919, and still is totally and permanently disabled by reason of and as a direct and proximate result of such disabilities above set forth (R. 100).

IV

The District Court erred in making and entering its finding No. 11, as follows:

11. That it is true that the aforesaid policy of war risk term insurance was in full force and effect during the month of November 1919, the date upon which the plaintiff was and became and ever since has been permanently and totally disabled for insurance purposes (R. 101).

V

The District Court erred in making and entering its Conclusion of Law No. 1, as follows:

1. That the insured, to-wit: the plaintiff, Walter Woodall, became permanently and totally disabled during the month of November 1919, and while said $5,000.00 policy of war risk term insurance was in full force and effect, and that at all times from and after said month of November 1919, the plaintiff was, ever since has been and now is totally and permanently disabled (R. 101).

VI

That the Court erred in making and entering its Conclusion of Law No. 2, as follows:

2. That the plaintiff herein is entitled to recovery from the defendant, United States of America, in accordance with the said war risk term insurance contract and the laws applicable thereto, monthly installments in the sum of $28.75 each for each and every month commencing with the month of November 1919, and continuously thereafter

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as long as he lives and continues to be permanently and totally disabled (R. 101).

VII

That the District Court erred in making and entering herein its Judgment for the plaintiff (R. 102).

VIII

That the District Court erred in denying Findings of Fact and Conclusions of Law as proposed by the defendant (R. 102).

IX

That the District Court erred in failing and refusing to find as proposed by defendant that plaintiff did not become totally disabled prior to the 1st day of February 1920 from tuberculosis, or any other disability, and did not become permanently disabled prior to the said 1st day of February 1920 from tuberculosis or any other disability (R. 102).

X

That the District Court erred in failing and refusing to make and enter its Conclusions of Law that the plaintiff, Walter Woodall, is not entitled to recover anything by his complaint and the defendant is entitled to a judgment, that plaintiff take nothing, and defendant be awarded its costs (R. 102).

XI

That the District Court erred in denying defendant judgment as proposed by the defendant (R. 103).

XII

That the District Court erred in denying defendant's Motion for Judgment at the conclusion of the evidence (R. 103).

SUMMARY OF THE EVIDENCE

Plaintiff's medical record showed no sickness or medical treatment while in the service except for chancroid and further showed that no disability was found upon examination of plaintiff at the time he was discharged from the service (Pltf.'s Ex. 2). Though plaintiff testified that soon after leaving service he consulted Dr. Evans, who gave him some kind of treatment for stomach and gall bladder trouble and cough (R. 43), Dr. Evans was not called to testify nor was any explanation offered for the absence of a more extensive report of his examination.

The earliest direct medical evidence was given by Dr. Hodges who reported from memory an examination he made of plaintiff in June 1920. He stated "as best he could remember" he made a diagnosis "as best he could under the circumstances" of "gall bladder trouble with possible gall stones or inflamed chronic bronchitis severe" and suspected tuberculosis (R. 47–48). He did not

use an X-ray and he made no sputum test. After about a dozen treatments he did not see plaintiff again until about 1928. Though he stated that the operation in June 1920, was successful and that there were occupations not requiring much physical exertion or exposure which plaintiff might have followed fairly well, he nevertheless stated that he thought plaintiff was totally permanently disabled in 1920 (R. 48–49).

Between this date and the fall of 1923 fourteen doctors examined plaintiff. A summary of their findings is set forth below:

> August 30, 1920, Drs. Nolan (R. 73–74) and Macgruder (R. 74–75): No abnormality found except the operative scar which was "getting along all right" (R. 73). Plaintiff complained of no symptoms except his recent operation. (Based upon Pltf's. Ex. 5, 6).
>
> September 10, 1920: Upon examination by a physician for the Southern Railroad, plaintiff was accepted as physically fit for employment by that company. The examining doctor testified that though it was a general examination the lungs and heart were found to be in good condition (R. 78).
>
> April or May, 1921 Dr. Hawkins (R. 62–63): Plaintiff was fatigued and emaciated with some infection of the bowels and gall bladder disturbance caused by bacteria which could be eliminated in a few months after which the condition should improve. Some operative adhesions were noted but

the doctor stated that these usually accommodated themselves. Plaintiff was too weak physically to follow an occupation at that time.

June 14, 1921 (Pltf's. Ex. # 8): Heart, lungs, and abdomen negative and X-ray negative for bone change. (Referring to a leg injury not otherwise in evidence.)

July 28, 1921 Dr. Long (Pltf's. Ex. # 9): Heart and lungs show no pathology.

August 2 and November 17, 1921, Dr. Dunham. (Pltf.'s Ex. #10, 11): Pulmonary tuberculosis, chronic, moderately advanced, active.

July 7, 1922, Dr. Smart (R. 65): Minimal tuberculosis, arrested and curable. (Based upon report introduced as Pltf.'s Ex. #22.)

October 13, 1922, Dr. Essenson (R. 68–69): Arrested tuberculosis with no evidence of activity. The examination included x-ray findings. (Based upon a written report introduced as Pltf.'s Ex. #13.)

October 13, 1922, Dr. Chandler (Pltf.'s Ex. #12): Pulmonary tuberculosis, chronic, moderately advanced. Prognosis, favorable.

April 10, 1923, Drs. Swink (R. 77) and Boyd (R. 76–77): Fibrosis of upper lobes of lungs, inactive if tuberculosis. Plaintiff failed to report for laboratory and x-ray tests. Able to work as freight brakeman or in clerical position. (The witnesses were familiar with the requirements of these occupations. Based upon Pltf.'s Ex. #14, 15.)

August 30, 1923, Dr. Allen (Pltf.'s Ex. #16): Tuberculosis, pulmonary, chronic, arrested. Prognosis, guardedly favorable.

September 21, 1923, Dr. Dewey (Pltf.'s Ex. #17): Tuberculosis, chronic, arrested. Able to resume pre-war occupation.

In addition to the above plaintiff's exhibit #7 shows that on January 20, 1921, the gall bladder operation had healed well.

Dr. Bridges examined the plaintiff in the fall of 1923 and again in 1928 and 1932. He testified that he made no record of these examinations and he believed the plaintiff gave him a case history of shortness of breath, night sweats, afternoon temperature, inability to do anything. He then stated that his diagnosis was pulmonary tuberculosis; that he told plaintiff he was suspicious of tuberculosis and advised him to rest. The witness then expressed the opinion that, though plaintiff was able to do light work at times during quiescence, he was nevertheless totally permanently disabled because of tuberculosis, which had existed for several months and which arose some time between 1919 and 1923 (R. 49–50).

During the next five years five doctors examined plaintiff. Their findings are summarized below:

Fall of 1923 (after examination by Dr. Bridges): Plaintiff passed a physical examination for an appointment with the Illinois Central Railroad (R. 45). (Plaintiff's testimony.)

Sometime in 1925: Plaintiff passed physical examination for employment with the United Fruit Company (R. 46). (Plaintiff's testimony.)

Early in 1927: Plaintiff passed physical examination for employment with the K. C. M. & O. Railroad (R. 46). (Plaintiff's testimony.)

July 8, 1927, Dr. DuPree (R. 71–72): Abnormal lung tissue, active tuberculosis not indicated, there could possibly have been some activity but, if so, it could not have been far advanced. (Based upon written report introduced as plaintiff's exhibit #21.)

February 9, 1928, Dr. Beem (R. 52–54): Gall bladder disease, neither the examination nor case history given by the plaintiff indicated tuberculosis. This doctor stated that ordinarily a gall bladder operation did not produce conditions to prevent a man from working though some cases have produced adhesions so severe as to prevent physical work.

In addition to the above plaintiff introduced exhibits numbered 18, 19, 20, which show pulmonary tuberculosis, far advanced in the spring of 1928 and early part of 1929.

In response to a hypothetical question (R. 56) including only part of the evidence (the question made no reference to plaintiff's exhibits 1 to 10; 13 to 18; or 21 and 22), Dr. Cohn expressed an opinion that plaintiff had tuberculosis when he

went into the Navy and became totally permanently disabled therefrom some time after enlistment and prior to discharge (R. 60). Though this witness had personally examined plaintiff (R. 60) apparently his own examination formed no portion of the basis of the above opinion. He explained that he arrived at this conclusion by the process of reasoning that a man at the age of thirty-three does not ordinarily or often develop tuberculosis; that plaintiff was diagnosed as having active tuberculosis in 1921 and according to Dr. Hodges plaintiff was also diagnosed as having active tuberculosis in the summer of 1920; that, therefore, it was obvious that the tuberculosis shown when the first x-ray was made (apparently August 1921) had been in the man's chest for a considerable period of time for which reason it undoubtedly was present and active at the time of plaintiff's discharge from service and consequently he was totally permanently disabled at that time (R. 57).

On cross-examination Dr. Cohn stated that tuberculosis is curable but that he would consider plaintiff's case to have become incurable about six months prior to the time the first doctor had said that he had tuberculosis (R. 58). He then stated that his opinion was as of 1933 and that "he couldn't render an opinion as to curability in 1920"; that plaintiff's tuberculosis was a type of slow progression so that it was impossible for it to have developed in the two year period between the date of discharge and the fall of 1921 (R. 61) and

that though the case had reached the stage of incurability as of the latter date he could not say whether or not it was curable at the time of discharge because he did not know (R. 62). The witness also testified that plaintiff's tuberculosis had not developed more rapidly because of gall-bladder trouble (R. 58).

Prior to 1928 plaintiff received the following treatment: Soon after discharge Dr. Evans treated him for stomach and gall-bladder trouble and cough (R. 43); on June 24, 1920, he had an operation for gall-bladder trouble (R. 38) and was given phosphate of soda and cough medicine (R. 48). In the winter of 1921 and 1922 he spent a short time in a tuberculosis hospital (R. 39) and was operated upon for appendicitis while there (R. 44). A third operation was performed for fistula in 1924 (R. 45–46). Though plaintiff testified (contrary to a statement purported by plaintiff's exhibit # 21 to have been made on July 8, 1927) that he consulted three doctors while in Honduras between 1925 and 1927 (R. 41), the nature of their treatment is not indicated.

Plaintiff testified that he was thirty-three years old when he enlisted (R. 36), that he had a fifth-grade education (R. 39), and that prior to that time he had worked on a farm, in a sawmill, and in the mines; that he worked short periods for different people, frequently going from one job to another. Sometimes he missed a week between jobs and

sometimes he secured a new job the same day he quit a previous one (R. 42–43).

According to plaintiff's own testimony he has been employed since service an aggregate of more than two years as follows:

In the oil fields prior to June 1924. One period of six weeks. One period of two months. (In an application made in August 1920 he stated that he worked from January to May 1920 at $6.00 per day (R. 43–44)) (Deft's. Ex. A).

For the Southern Railroad. September to December 1920. Plaintiff testified that he worked only about one-half time here (R. 38), but on cross-examination he explained that he was on the extra list subject to call and that he worked whenever called (R. 44).

In an undertaking parlor, winter 1922 and 1923. Six or eight weeks as part of vocational training (R. 31). Missed only a day or two (R. 44).

Railroad work in the summer of 1923. One month on his former job with the Southern Railroad (R. 45). Three or four months with the Illinois Central Railroad. On this job he was on the extra list subject to call. Plaintiff stated that sometimes he was not able to answer the call (R. 45).

Winter 1923 and 1924. Two or three months as a shirt salesman. Plaintiff stated that he earned $30.00 to $40.00 per month and worked on an average of five or six hours per day (R. 40).

In Honduras 1925 to 1927. One period of two months. One period of three months. More later. Plaintiff testified that he was able to work only about two days per week (R. 41).

For the K. C. M. & O. Railroad 1927. Six or eight days (R. 46–47).

The testimony of the plaintiff and one of his lay witnesses indicates that while in the service the plaintiff worked part of the time as a coal passer in the fireroom of his ship; that the fireroom was comfortable while in port but very hot and poorly ventilated while at sea; that plaintiff slept on a deck where ventilation was bad when the ship was out at sea. Plaintiff testified that on one occasion he "fell out" from over-heat, after which he was put in charge of the evaporators which was very much lighter work (R. 36–37). The ship was out of port three or four days for each trip and made two trips a month for three consecutive months (R. 34–35). Plaintiff testified that while in the service and at discharge he had a tired feeling, a cough and cold with pains in his chest and abdomen, accompanied by constipation and diarrhoea (R. 37). In substance he repeated this testimony as of the fall of 1920 (R. 39); the spring of 1921 (R. 39); the winter of 1922 and 1923 (R. 32, 44). He testified that in the fall of 1923 he had pains in his abdomen, omitting the pains in his chest, and that he was tired (R. 40) and the same symptoms were reported by him for the time he was in Honduras and as of May,

1928 (R. 41). In 1921 plaintiff was drawing $80.00 per month compensation (R. 44) which was stopped about the end of 1923. He made no attempt to have his compensation reinstated (R. 46).

POINTS AND AUTHORITIES

There is no substantial evidence that plaintiff was totally permanently disabled from November 1919

Falbo v. *United States,* 64 F. (2d) 948 (C. C. A. 9th), affirmed, *per curiam,* 291 U. S. 646.

United States v. *McShane,* 70 F. (2d) 991 (C. C. A. 10th), certiorari denied, 55 S. Ct. 141.

Grate v. *United States,* 72 F. (2d) 1 (C. C. A. 8th), certiorari applied for.

Puckett v. *United States,* 70 F. (2d) 895 (C. C. A. 5th), certiorari denied, 55 S. Ct. 99.

United States v. *Baker* (C. C. A. 4th), 73 F. (2d) 455.

United States v. *Hansen,* 70 F. (2d) 230 (C. C. A. 9th).

United States v. *Hill,* 61 F. (2d) 651 (C. C. A. 9th).

United States v. *Crume,* 54 F. (2d) 556 (C. C. A. 5th).

ARGUMENT

I

There is no substantial evidence that plaintiff was totally permanently disabled from November 1919

Except for a service record of chancroid, a disability both minor and temporary, there is no con-

temporaneous medical testimony of any disability during the entire time, nearly two years, that plaintiff was in the naval service nor within the period of his insurance protection. Though in the summer of 1920 plaintiff had a gall bladder operation from which he made a normal recovery (R. 73, Pltf's. Ex. 5, 6), the first definite diagnosis of active tuberculosis, upon which disability his case rests primarily, was not made until August 2, 1921. The lay evidence of plaintiff's physical condition during the time his policy was in force consists entirely of his own testimony that while still in the service he had a cold and cough, felt tired and had some pains in his chest and abdomen.

Though it cannot be conceded, it might for the moment be speculatively assumed that in November 1919, plaintiff was totally disabled by reason of incipient tuberculosis. But having assumed this there is still a total absence of proof that such disability was then permanent, and the case falls within the ruling of this Court in *Falbo* v. *United States,* 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam,* 291 U. S. 646 and the rulings of numerous other decisions of which the following are illustrative:

> *United States* v. *McShane,* 70 F. (2d) 991 (C. C. A. 10th) certiorari denied 55 S. Ct. 141.
>
> *Grate* v. *United States,* 72 F. (2d) 1 (C. C. A. 8th) (certiorari applied for).
>
> *Puckett* v. *United States,* 70 F. (2d) 991 (C. C. A. 5th) certiorari denied 55 S. Ct. 99.

United States v. *Baker* (C. C. A. 4th), 73 F. (2d) 455.

The principal of these decisions has been effectively stated by Judge Parker speaking for the Fourth Circuit in *United States* v. *Messinger,* 68 F. (2d) 234, 237:

> To say that a man who has an arrested case of tuberculosis, or a case which can be arrested with proper treatment, is totally and permanently disabled, because he cannot do heavy labor or work amid all conditions, is to adopt a theory contrary to human experience and one which has been repudiated by the courts in a practically unbroken line of decisions.

Each of three doctors for plaintiff testified to an opinion of total permanent disability. Such opinions, clearly inadmissible upon objection (*United States* v. *Stephens* (C. C. A. 9th), decided November 13, 1934) and presumably not considered in a nonjury case (*United States* v. *National Bank of Commerce of Seattle* (C. C. A. 9th), decided November 19, 1934), would not, in any event, constitute substantial evidence. *United States* v. *Baker* (C. C. A. 9th), decided November 13, 1934; *Hamilton* v. *United States* (C. C. A. 5th), 73 F. (2d) 357; *United States* v. *Howard,* 64 F. (2d) 533 (C. C. A. 5th); *United States* v. *Doublehead,* 70 F. (2d) 91 (C. C. A. 10th).

Whatever significance may be given to the testimony of Dr. Bridges has a tendency to refute rather than to support plaintiff's contention. He

thought plaintiff's tuberculosis "arose some time between 1919 and 1923" (R. 50). Dr. Hodges, plaintiff's witness, testified that there "were occupations Woodall could have held down fairly well where not much physical exertion or exposure was required" (R. 49). The insurance matures only in the event of disability precluding pursuit of *any* substantially gainful occupation (*United States* v. *Thomas,* 53 F. (2d) 192 (C. C. A. 4th); *Proechel* v. *United States*, 59 F. (2d) 648 (C. C. A. 8th) and the fact that little exertion is required does not alter the legal effect upon a claim of earlier total permanent disability of a recognized ability to work. *United States* v. *Hansen,* 70 F. (2d) 230 (C. C. A. 9th); *United States* v. *Green,* 69 F. (2d) 921 (C. C. A. 8th); *United States* v. *Timmons,* 68 F. (2d) 654 (C. C. A. 5th). Dr. Cohn did not profess to have any opinion concerning the curability of plaintiff's disability during the time the insurance was in force (R. 58, 62).

Though in June 1920 Dr. Hodges, whose diagnosis of plaintiff's case is the earliest appearing in evidence, suggested to plaintiff that he might have tuberculosis, the records show no treatment for tuberculosis until the latter part of 1921, when plaintiff spent a short time in a tuberculosis hospital in Los Angeles. In 1923 he was again advised by a doctor that he probably had tuberculosis, yet the record does not show that between 1923 and 1928 he received any treatment for this condition. On the other hand, there is the positive evidence,

based upon reports of physical examinations, that plaintiff's tuberculosis was curable on July 7, 1922 (R. 65, Pltf.'s Ex. #22) and that it was arrested and that he was able to work on October 13, 1922 (R. 68–69, Pltf.'s Ex. #13); April 10, 1923 (R. 76–77). It is well established that an insured cannot recover on a War Risk Insurance policy for a total disability existing before lapse which became permanent after lapse because of failure to take treatment.

Falbo v. *United States, supra.*

United States v. *McShane, supra.*

Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

United States v. *Rentfrow,* 60 F. (2d) 488 (C. C. A. 10th).

Though abstractly the work record, consisting of an aggregate of short periods, is not impressive, it compares favorably with plaintiff's piecemeal work record prior to service, and the three temporary disabilities which arose subsequent to service and for each of which a successful operation was performed, have no tendency to establish total permanent disability during the life of the insurance policy. On the other hand, they tend more to explain why plaintiff, otherwise not totally disabled, did not work more regularly.

United States v. *Linkhart,* 64 F. (2d) 747 (C. C. A. 7th).

United States v. *Ennis,* 73 F. (2d) 310 (C. C. A. 4th).

Considering plaintiff's long delay in bringing suit, his case is left entirely in the realm of speculation, surmise and conjecture,

Lumbra v. *United States,* 290 U. S. 551.
United States v. *McShane, supra.*
Eggen v. *United States, supra.*

and viewing the evidence in the light most favorable to him, it is apparent that his case falls within the rule where if either of two inconsistent inferences may be drawn, one that he was totally disabled and the other that he was not, he has established neither and is not entitled to recover. *Eggen* v. *United States,* 58 F. (2d) 616 (C. C. A. 8th); *Penna. R. Co.* v. *Chamberlain,* 288 U. S. 333; *Stevens* v. *The White City,* 285 U. S. 195.

CONCLUSION

Defendant respectfully submits that there was no substantial evidence that plaintiff was totally permanently disabled from November 1919, that the trial court erred as heretofore assigned, and that, therefore, the judgment of said trial court should be reversed.

PEIRSON M. HALL,
United States Attorney.
HUGH L. DICKSON,
Asst. United States Attorney.
WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.
KEITH L. SEEGMILLER,
Attorney, Department of Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1935

No. 7504

United States

Circuit Court of Appeals

For the Ninth Circuit. 21

L. H. WOLF,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 7504

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L. H. WOLF,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

ROBERT N. MILLER, Esq.,
M. D. WILSON, Esq.,

For Comm'r.:

A. L. MURRAY, Esq.,
ALVA C. BAIRD, Esq.

DOCKET ENTRIES.

1932

Mar. 30—Petition received and filed. Taxpayer notified. (Fee paid)

" 30—Copy of petition served on General Counsel.

Apr. 19—Answer filed by General Counsel.

" 28—Copy of answer served on taxpayer. General Calendar.

Sept. 20—Hearing set Nov. 9, 1932.

" 26—Motion to place on Circuit Calendar for hearing at Los Angeles, California, filed by taxpayer. 9/29/32 granted.

1933

Oct. 2-3—Hearing had before E. H. Van Fossan, Div. 9. Submitted. By agreement of counsel set for hearing Oct. 2, 1933. No hearing notice sent. Stipulation of facts filed. Briefs due Dec. 1, 1933. No exchange.

" 21—Amended petition filed. 10/23/33 copy served.

1933

Oct. 12—Transcript of hearing of Oct. 2 & 3, 1933, Long Beach, Cal. filed.

Nov. 29—Brief filed by taxpayer.

Dec. 1—Brief filed by General Counsel.

1934

Jan. 9—Memorandum opinion rendered, E. H. Van Fossan, Div. 9. Decision will be entered for respondent.

" 11—Decision entered, E. H. Van Fossan, Div. 9.

Apr. 2—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 2—Proof of service filed.

May 15—Agreed statement of evidence lodged.

" 15—Motion for transmission of original exhibits filed by taxpayer. 5/17/34 granted.

" 15—Praecipe filed—proof of service thereon.

" 17—Agreed statement of evidence approved and ordered filed. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals
Docket No. 63589

L. H. WOLF,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:E-1 EEW-60D, dated February 1, 1932, and as a basis of his proceeding alleges as follows:

1. The Petitioner is an individual residing at 7840 Sunset Boulevard, Los Angeles, California.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the Petitioner on February 1, 1932.

3. The taxes in controversy are individual income taxes for the calendar year 1929 in the amount of $1,249.44.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Respondent erred in recognizing a profit from the involuntary conversion of a parcel of taxpayer's [2] property.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) Taxpayer owned a lot in Hollywood, California, 383 feet long and 103 feet wide.

(b) In 1929 the City of Los Angeles opened up Ivar Avenue and condemned a diagonal strip across the center of Petitioner's property seventy (70) feet wide.

(c) The City of Los Angeles, by order of the Court, paid Petitioner, for improvements and severance damages, $14,273, and the amount of $23,549 for the land taken from Petitioner.

(d) The City of Los Angeles levied a special assessment on the two newly created parcels of property for the opening and widening work, of $19,470.32 and $19,243.28, respectively, making a total of $38,713.60.

(e) Petitioner expended the entire proceeds from the award for buildings, severance and land, in the payment of the special assessment on the two newly created parcels.

(f) The Petitioner expended the proceeds of the property involuntarily converted, in the acquisition of other property similar or related in service or use to the property so converted.

(g) The gain, if any, therefore, should not be recognized.

WHEREFORE, Petitioner prays that the Board may hear this proceeding and find that the entire proceeds from the property [3] involuntarily converted was expended in the acquisition of other

property similar or related in service or use to the property so converted, and that any apparent profit should not be recognized for income tax purposes.

ROBERT N. MILLER
c/o Miller & Chevalier,
922 Southern Building,
Washington, D. C.
MELVIN D. WILSON
c/o Miller, Chevalier, Peeler & Wilson,
819 Title Insurance Building,
Los Angeles, California.
Counsel for Petitioner. [4]

State of California,
County of Los Angeles—ss.

L. H. WOLF, being duly sworn, says:

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

L. H. WOLF

Subscribed and sworn to before me this 25 day of March, 1932.

[Seal] BESSIE M. CLEMENT
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires March 18, 1934. [5]

"EXHIBIT A" NP-2-28

TREASURY DEPARTMENT
Washington

Office of Feb. 1, 1932
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and Refer to
Mr. L. H. Wolf,
7840 Sunset Boulevard,
Los Angeles, California.

Sir:

You are advised that the determination of your tax liability for the year(s) 1929, discloses a deficiency of $1,249.44, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return (s) by permitting an early assessment of any deficiency and preventing the accumulation of interest

charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [6]

STATEMENT

IT:AR:E-1
EEW-60D

In re: Mr. L. H. Wolf,
7840 Sunset Boulevard,
Los Angeles, California

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$1,273.35	$23.91	$1,249.44

Further reference is made to your letter of December 29, 1931, in which you wish to cancel the agreement, form 870, forwarded to this office for the year 1929, and request that a sixty-day letter be issued.

In compliance with your request, a sixty-day letter is being issued.

The change in income is as follows:

Net income reported on return	$ 7,789.44
Add:	
1. Profit from sales	18,349.00
Adjusted net income	$26,138.44

Computation of Tax

Adjusted net income	$26,138.44
Less:	
Personal exemption	3,500.00
Income subject to normal tax	$22,638.44
Normal tax at ½% on $4,000.00	$ 20.00
Normal tax at 2% on $4,000.00	80.00
Normal tax at 4% on $14,638.44	585.54
Surtax on $26,138.44	589.69
Total tax	$ 1,275.23

[7]

Less:	
Earned income credit	1.88
Tax liability	$1,273.35
Tax assessed	23.91
Deficiency in tax	$1,249.44

Explanation of Change

1. The amount of $18,349.00 represents profit from real estate condemned for street widening purposes. The computation is as follows:

Cost of land in 1920	$20,200.00
Cost of drain installed	800.00
Total cost	$21,000.00
Award received for portion condemned	$23,549.00
Cost of portion condemned $21,000.00 x 20%	4,200.00
	$19,349.00
Less attorney fees	1,000.00
Taxable gain	$18,349.00

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274 (a) of the Revenue Act of 1926 and/or section 272 (a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

[Endorsed]: United States Board of Tax Appeals. Filed March 30, 1932. [8]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in this proceeding, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits the allegations in paragraph 3 of the petition.

4. (a) Denies that the respondent's determination is based on error as alleged in subparagraph (a) of paragraph 4 of the petition.

5. Denies the material allegations of fact contained in subparagraphs (a) to (g) inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinabove specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any errors that may have been committed by the Commissioner. Claim is hereby asserted for the increas-

ed deficiency, if any, resulting from such redetermination.

[Signed] C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. H. YEATMAN,
Special Attorney,
Bureau of Internal Revenue.
4/18/32

[Endorsed]: United States Board of Tax Appeals. Filed Apr. 19, 1932. [9]

[Title of Court and Cause.]

AMENDED PETITION

Permission having been granted, the above-named Petitioner hereby files his Amended Petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:E-1 REW-60D, dated February 1, 1932, and as a basis of his proceeding alleges as follows:

1. The Petitioner is an individual residing at 7840 Sunset Boulevard, Los Angeles, California.

2. The notice of deficiency, a copy of which was attached to the original Petition and marked "Exhibit A," was mailed to the Petitioner on February 1, 1932.

3. The taxes in controversy are individual in-

come taxes for the calendar year 1929 in the amount of $1,249.44.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error: [10]

(a) The Respondent erred in recognizing a profit from the involuntary conversion of a parcel of taxpayer's property.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) The taxpayer, in 1921, acquired a lot 103 feet wide and 383 feet deep, facing on Cahuenga Avenue, located in Hollywood, California.

(b) The lot cost Petitioner $21,000.00.

(c) Between 1920 and 1925, Petitioner constructed various buildings on said property.

(d) In 1929, the City of Los Angeles opened up Ivar Avenue and condemned a strip 70 feet wide running diagonally across the center of Petitioner's property. This strip represented 20 per cent of the area of Petitioner's property.

(e) By order of Court, Petitioner was awarded from the city of Los Angeles, the following amounts:

For damages to buildings	$10,267.00
As severance damages to the balance of Petitioner's land	4,006.00
As an award for the land taken from Petitioner	23,549.00
Total	$37,822.00

(f) The City of Los Angeles levied special assessments on the two newly created parcels of property for the opening and widening work, amounting to $19,470.32 and $19,243.28, respectively, making a total of $38,713.60. [11]

(g) The City of Los Angeles credited the awards mentioned above, totaling $37,822.00, against the special assessments, totaling $38,-713.60, and collected from Petitioner, in 1929, the difference of $891.60.

(h) Thereafter, the City of Los Angeles levied, and the Petitioner paid, further special assessments on the two newly created parcels, in the amounts of $1,317.20 and $1,315.55, respectively, for paving, sidewalks, storm drain, etc., along Ivar Avenue, occasioned by the opening of said Avenue in 1929.

(i) Petitioner, in 1929, paid Attorney's fees in the sum of $1,000, in connection with the condemnation and the awards and the special assessments.

(j) On account of the opening of Ivar Street, through Petitioner's land, he was required to demolish and remove a portion of his buildings, and to face the remaining buildings fronting on the said new streets. This work was done in 1929 and 1930 and cost Petitioner $6,809.98.

(k) Petitioner did not, in 1929, sell his remaining parcels as described above.

(l) Petitioner did not, in receiving the

awards from the City of Los Angeles, recover his cost in the said property, consequently, no gain was realized.

(m) Petitioner expended the entire proceeds from the award for buildings, severance and land, in the payment of the special assessments on the two newly created [12] parcels. Petitioner expended the proceeds of the property involuntarily converted, in the acquisition of other property similar or related in service or use to the property so converted. The gain, if any, should not be recognized.

WHEREFORE, Petitioner prays that the Board may hear this proceeding and find that Petitioner did not, in 1929, recover the cost of this property converted, or that the entire proceeds from the property involuntarily converted were expended in the acquisition of other property similar or related in service or use to the property so converted, and that any apparent profit should not be recognized for income tax purposes.

ROBERT N. MILLER,
c/o Miller & Chevalier,
922 Southern Building,
Washington, D. C.
MELVIN D. WILSON,
c/o Miller, Chevalier, Peeler & Wilson,
819 Title Insurance Building,
Los Angeles, California.
Counsel for Petitioner [13]

State of California
County of Los Angeles.—ss.

L. H. WOLF, being duly sworn, says:

That he is the Petitioner above-named; that he has read the foregoing Amended Petitioner and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

L. H. WOLF

Subscribed and sworn to before me this 17 day of October, 1933.

[Seal] MILDRED K. ROGERS
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 21, 1933.

ANSWER TO AMENDED PETITION

(Read into record October 2, 1933)

* * * MR. MURRAY: I would like the record to show that I enter a general denial to that amended petition.

The MEMBER: It will so show. [14]

[Title of Court and Cause.]

1. Where, pursuant to condemnation proceedings, property is taken for public purposes, and an award is made for land and buildings so taken and severance damages, which award is paid by application against the assessment levied for benefits

accruing to remaining property, the proceeding constitutes a closed transaction which may result in taxable gain.

2. The construction by the city of a street through taxpayer's property, after condemnation proceedings, in connection with which taxpayer receives an award for property taken, does not of itself result in the acquisition of "property similar or related in service or use" within the meaning of section 112 (f) of the Revenue Act of 1928.

Melvin D. Wilson, Esq., for the petitioner.

Alva C. Baird, Esq., and A. L. Murray, Esq., for the respondent.

MEMORANDUM OPINION

VAN FOSSAN: A deficiency in the amount of $1,249.44 for the year 1929 is here in issue. The proposed additional tax arises from the respondent's determination that the proceeds of an award received by taxpayer in connection with a land condemnation proceeding were taxable as income. Petitioner assigns this recognition of gain on the involuntary conversion of his property as error.

In 1920 petitioner acquired a parcel of property located in Hollywood, California, described as lot A, tract 2129, Map Book 24, page 68, Los Angeles County, California. The cost of such property was $21,000.

Between 1920 and 1925 petitioner constructed various buildings on said property. The buildings covered the entire lot, except for a driveway through the property. A two-story brick building stood on

the front portion of the lot. The second story was built over the driveway. A smaller frame and stucco building was on the rear of the lot.

The property was 103 feet wide, fronting on Cahuenga Avenue, and 383 feet deep. [15]

In 1929 the city of Los Angeles, for the purpose of opening up Ivar Avenue, a public thoroughfare, condemned a strip 70 feet wide running diagonally across the approximate center of petitioner's land. This strip represented 20 percent of the total area of petitioner's property. By Ordinances No. 53214 (approved November 10, 1925), and No. 54065 (approved February 24, 1926), the city of Los Angeles created a special improvement district and the condemnation proceedings and improvements herein referred to were made pursuant thereto.

By order of court petitioner was awarded the following amounts:

(1)	Award for building taken	$10,267
(2)	Award for the land taken from petitioner	23,549
(3)	As severance damages for the balance of land not taken	4,006
	Total	37,822

The city of Los Angeles levied special assessments for opening and widening work on the newly created street adjacent to parcels of petitioner's property in the amounts of $19,470.32 and $19,243.28 respectively, totaling $38,713.60.

Petitioner paid the special assessments amounting to $38,713.60 by applying the awards amounting to $37,822 against assessments and paying the balance of $891.60 in cash.

In 1931 the city of Los Angeles levied, and the petitioner paid, further special assessments on the two newly created parcels of $1,317.20 and $1,315.55 for the paving, sidewalks, storm drain, etc., along Ivar Avenue, occasioned by the opening of the avenue in 1929.

In 1929 petitioner paid $1,000 attorney's fees in connection with the awards and special assessments.

It was determined by the respondent that the petitioner derived income of $18,349 on the payment made for the land, computed as follows:

Award received for portion condemned	$23,549
Cost of portion condemned	4,200
Difference	19,349
Less attorney fees	1,000
Taxable gain	18,349

In respect of the buildings the petitioner sustained neither gain nor loss.

Petitioner did not sell, exchange, or otherwise dispose of the above described property in 1929 except as stated above.

On the basis of these facts taxpayer makes two contentions: First, that there was not a closed transaction giving rise to taxable gain, and, second, in

the alternative, the award was expended in the [16] acquisition of property similar or related in service or use to that taken, bringing the case under the statutory exception of section 112 (f) of the Revenue Act of 1928.

We are unable to find merit in either of petitioner's contentions. As to the first, it seems obvious that a closed transaction has occurred. Petitioner's property has been taken and he has parted with all interest. The fact that it was an involuntary proceeding brings no hope or comfort to taxpayer. It is gone beyond chance of return. Petitioner has been paid for the property by an official award by a court of competent jurisdiction. He has accepted the award by applying it against the assessment against the remainder of the property. Thus he has been paid for the property involuntarily sold to the city. The fact that there was an assessment for benefits does not alter the case. This relates to benefits accruing to the remaining property from the improvement. It also has been judicially fixed. In this situation we find every element of a closed transaction and a proper situation for imposition of tax on the gain derived.

Nor is there any substance in petitioner's second point—the conversion of the award into property similar or related in use. The simple fact is that petitioner did not expend the award in any such manner. The highly artificial argument advanced that he has converted the award into an interest or right in the new thoroughfare does not impress us

as worthy of extended consideration. Such an interpretation would make the statute a meaningless nullity. It would present imponderable questions of valuation. It would depart from all recognized canons of construction, among the most fundamental of which is that an unambiguous statute couched in words of ordinary comprehensible meaning should be interpreted in accordance with its plain terms and not distorted by artificial reasoning. Here the statute is plain in word and meaning and permits of no such construction or application as petitioner would give it.

We find the respondent's action to be in accord with law and the facts. John J. Bliss, 27 B.T.A. 803.

Decision will be entered for the respondent.

Entered January 9, 1934. [17]

United States Board of Tax Appeals
Washington

Docket No. 63589

L. H. WOLF,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered January 9, 1934, it is

ORDERED AND DECIDED: That there is a deficiency of $1,249.44 for the year 1929.

[Endorsed]: Entered Jan. 11 1934.

[Seal] [Signed]

ERNEST H. VAN FOSSAN,

Member. [18]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No.....

L. H. WOLF,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

L. H. WOLF, in support of this, his petition, filed in pursuance of Section 1001 of the Revenue Act of 1926 (44 Stat. 109), for the review of the decision of the United States Board of Tax Appeals, promulgated on the 9th day of January, 1934, and its judgment entered on the 11th day of January, 1934, in the case of L. H. Wolf, Petitioner, v. Com-

missioner of Internal Revenue, Respondent, Number 63, 589, under docket of said Board, wherein the Board redetermined a deficiency of income tax against the Petitioner for the calendar year 1929 in the amount of $1,249.44, respectfully shows this Honorable Court as follows:

I.

STATEMENT OF THE NATURE OF THE CONTROVERSY. [19]

1. That on February 1, 1932, the Commissioner of Internal Revenue, in accordance with Section 272 of the Revenue Act of 1928, addressed a letter to the Petitioner proposing deficiencies in taxes for the taxable year 1929 in the amount of $1,249.44.

2. That within sixty days from the date of the aforesaid deficiency letter, to-wit; on or about the 30th day of March, 1932, Petitioner duly filed with the United States Board of Tax Appeals, in pursuance of the provision of the Revenue Acts applicable thereto, his petition requesting the redetermination of the deficiency above referred to, and said petition was duly docketed with the said Board under Docket No 63,589. That on or about October 2, 1933, with the permission of the Board, the petitioned filed, with the said Board, an Amended Petition.

The facts, as alleged in the Amended Petition, as agreed to by Stipulation, or introduced into evidence without contradiction, are as follows:

Petitioner, in 1920, acquired a single parcel of property, 103 feet wide and 383 feet long, located

in Hollywood, California, described as Lot "A," Tract 2129, Map Book 24, Page 68. The lot cost $21,000.

Between 1920 and 1925, Petitioner constructed various buildings on the property, at a total cost of $75,000. The buildings covered the entire lot, except for a driveway through the center of the property.

In 1929, the City of Los Angeles, for the purpose of opening up Ivar Avenue, a public thoroughfare, condemned a right of way 70 feet wide, running diagonally across the approximate center of [20] Petitioner's land and buildings. The right of way covered 20 per cent of the total area of Petitioner's property. A special improvement district was created and the condemnation and improvements hereinafter mentioned were part of its work. Petitioner did not vote or petition for the creation of this district.

The City of Los Angeles, in 1929, levied special assessments against Petitioner's property for opening Ivar Avenue, in the amounts of $19,470.32 and $19,243.28, respectively, on the two newly created parcels on either side of Ivar Avenue. In 1931, the City of Los Angeles levied special assessments on the two newly created parcels, for paving, sidewalks, storm drain, etc., along Ivar Avenue, of $1,317.20 and $1,315.55, respectively. In 1929, Petitioner paid an Attorney $1,000 to represent him in connection with said assessments and the award hereinafter mentioned. In 1929 and 1930, Peti-

tioner expended $6,809.78 in the necessary demolition, alteration, and refacing of buildings along the right of way.

The total amount necessarily expended by Petitioner in connection with this condemnation was $49,156.13.

By order of Court, Petitioner was awarded $10,267 for buildings taken, $23,549 for the right of way taken, and $4,006 as severance damages for the balance of the land, or a total of $37,822.

Petitioner did not receive these awards in cash but they were applied as a credit on the assessments.

After the condemnation was completed and all the above assessments and amounts had been paid, Petitioner had a further invest- [21]ment in his property of $11,274.13, and had the exclusive use of 20 per cent less land and had 20 per cent less buildings.

The Respondent computed a profit on the transaction as follows:

Award received for land taken	$23,549.00
Cost of land taken (20% of $21,000)	4,200.00
Difference	$19,349.00
Less Attorney's fees	1,000.00
Taxable gain	$18,349.00

Petitioner did not sell, exchange, or otherwise dispose of the above described property, in 1929, except as stated above.

Petitioner sustained neither gain nor loss with respect to the buildings.

The portion of Petitioner's property affected by the opening of Ivar Avenue was, both before and after such opening, in a light manufacturing district. The character of the business of Petitioner's tenants was the same after the opening of Ivar Avenue as it was before.

The community around Petitioner's property has not been improved or built up since the opening of Ivar Avenue.

The opening of Ivar Avenue so disrupted Petitioner's property that many of his tenants moved out, and a substantial portion of his property was vacant for over a year.

The rental income from the front portion of Petitioner's property, which was not affected by the opening of Ivar Avenue, was the same after the opening of Ivar Avenue as it was before.

The rental income from the rear portion of Petitioner's pro- [22] perty was reduced from $650 per month to $265 per month by the opening of Ivar Avenue. The opening of Ivar Avenue left the floor of Petitioner's buildings about 24 inches above the street level and 18 inches above the sidewalk level.

The Petitioner contended that he had not realized any taxable income out of this transaction, and that the Respondent had erred in increasing his 1929 income by $18,349, or any amount on account of this transaction.

3. Within the time allowed by law, the Commissioner of Internal Revenue filed, with said Board, his Answer in said cause, Docket No. 63,589, by which were raised the issues determined by said decision of the United States Board of Tax Appeals.

4. The cause, being at issue, duly came on for hearing on the 2nd day of October, 1933, at which time the parties filed a written Stipulation, and submitted other evidence to the Board upon oral Stipulation; the Petitioner introduced without contradiction, other testimony by a competent witness. Thereafter, on January 9, 1934, the Board rendered its Memorandum Opinion, in which it stated the facts covered by the written Stipulation, together with an opinion in which it held that a taxable profit, as computed by Respondent, was realized by the Petitioner from the circumstances related above. On January 11, 1934, the Board entered its final order of redetermination approving the deficiency as determined by the Respondent in the amount of $1,249.44, for 1929.

II.

DESIGNATION OF COURT OF REVIEW.

[23]

The Petitioner, being aggrieved by the said findings of fact, opinion, decision and order, and being an inhabitant of the State of California, County of Los Angeles, City of Los Angeles, and within the Ninth Circuit, desires a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue to whom

Petitioner made his income tax return for the calendar year 1929, involved herein.

III.

ASSIGNMENTS OF ERROR.

The Petitioner, as a basis for review, makes the following assignments of error:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1929.

2. The Board of Tax Appeals erred as a matter of law in deciding that Petitioner realized any taxable income in 1929 arising out of the involuntary condemnation of his property.

3. The Board of Tax Appeals erred in deciding that there was a closed transaction in 1929.

4. The Board of Tax Appeals erred in finding that Petitioner derived cash or anything else from his property in 1929, as a result of its involuntary conversion.

5. The Board of Tax Appeals erred in failing to find that Petitioner's property was involuntarily converted into other property similar or related in service or use to the property so converted. [24]

6. The Board of Tax Appeals erred in failing to find that Petitioner reinvested the proceeds of the involuntary conversion of his property in the acquisition of other property similar or related in service or use to the property so converted.

7. The Board of Tax Appeals erred in failing to find that the rental value of Petitioner's property was decreased by the transaction involved.

8. The Board of Tax Appeals erred in failing to find that the character of Petitioner's property was not improved by the opening of Ivar Avenue through Petitioner's property.

9. The Board of Tax Appeals erred in failing to find that the sidewalk on Ivar Avenue was graded and paved about two feet below the level of the floors in Petitioner's buildings.

10. The Board of Tax Appeals erred in its decision and determination of a deficiency of $1,249.44 for the taxable year 1929.

11. The Board erred in rendering decision for the Respondent.

WHEREFORE, your Petitioner prays that this Honorable Court may review said findings, decision, opinion, and order, and reverse and set aside the same; that it direct the United States Board of Tax Appeals to determine that no deficiency is due by the Petitioner in this proceeding; and for such other and further relief [25] as the Court may deem meet and proper in the premises.

MELVIN D. WILSON
819 Title Insurance Building,
Los Angeles, California.
HOMER HENDRICKS,
922 Southern Building,
Washington, D. C.
Counsel for Petitioner.

Of Counsel:
MILLER & CHEVALIER,
922 Southern Building,
Washington, D. C. [26]

State of California
County of Los Angeles.—ss.

MELVIN D. WILSON, being duly sworn, deposes and says:

That he is an Attorney-at-Law, authorized to practice before the United States Board of Tax Appeals, and the United States Circuit Court of Appeals for the Ninth Circuit, and has his office at 819 Title Insurance Building, Los Angeles, California.

That he was the Attorney of record for the Petitioner named in the foregoing Petitio*ner,* before the United States Board of Tax Appeals.

That he is familiar with the facts stated in the foregoing Petition and alleges them to be true.

Said Petition is filed in good faith.

MELVIN D. WILSON,

Subscribed and sworn to before me this 28 day of March, 1934.

MILDRED K. ROGERS
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: United States Board of Tax Appeals. Filed April 2, 1934. [27]

United States Board of Tax Appeals

Docket No. 63,589

L. H. WOLF,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF EVIDENCE

This cause came on for hearing before Hon. Ernest H. Van Fossan, Member of the United States Board of Tax Appeals, on October 2nd and 3rd, 1933, at Long Beach, California. Melvin D. Wilson, Esq., appeared for the Petitioner, and Alva C. Baird, Esq., and A. L. Murray, Esq., Special Attorneys, Bureau of Internal Revenue, appeared for Respondent.

The parties filed a written Stipulation which read as follows:

"It is hereby stipulated, between the parties hereto, through their respective counsel, that the above entitled cause may be submitted to the United States Board of Tax Appeals on the facts hereinafter set forth.

I.

"In 1920, Petitioner acquired a parcel of property located in Hollywood, California, described as Lot "A," Tract 2129, Map Book 24, Page 68, Los Angeles County, California. That the cost [28]

of such property was Twenty-one Thousand Dollars ($21,000.00).

II.

"Between 1920 and 1925, Petitioner constructed various buildings on said property. The said buildings covered the entire lot, except for a driveway through the property. A two story brick building stood on the front portion of the lot. The second story was built over the driveway. A smaller frame and stucco building was on the rear of the lot.

III.

"The property was 103 feet wide, fronting on Cahuenga Avenue and 383 feet deep.

IV.

"In 1929, the City of Los Angeles, for the purpose of opening up Ivar Avenue, a public thoroughfare, condemned a strip 70 feet wide running diagonally across the approximate center of Petitioner's land. This strip represented 20 per cent of the total area of Petitioner's property. By Ordinances No. 53214 (approved November 10, 1925), and No. 54065 (approved February 24, 1926), the City of Los Angeles created a special improvement district and the condemnation proceedings and improvements herein referred to, were made pursuant thereto.

V.

"By order of Court, Petitioner was awarded the following amounts:

"(1) Award for buildings taken.....$10,267.00
(2) Award for the land taken from Petitioner 23,549.00
(3) As severance damages for the balance of land not taken..... 4,006.00

Total.....$37,822.00

[29]

VI.

"The City of Los Angeles levied special assessments for opening and widening work on the newly created street adjacent to parcels of Petitioner's property in the amounts of $19,470.32 and $19,243-.28 respectively, totaling $38,713.60.

VII.

"Petitioner paid the special assessments amounting to $38,713.60, by applying the awards amounting to $37,822.00, against assessments and paying the balance of $891.60 in cash. Copies of the Special Asessments are attached hereto and marked Exhibits 1 and 2.

VIII.

"In 1931, the City of Los Angeles levied, and the Petitioner paid further special assessments on the two newly created parcels of $1,317.20, and $1,315.-55 for the paving, sidewalks, storm drain, etc., along Ivar Avenue, occasioned by the opening of said Avenue in 1929. Copies of the special assessments are attached hereto and marked Exhibits 3 and 4.

IX.

"In 1929, Petitioner paid $1,000.00 Attorney's fees in connection with the said awards and special assessments.

X.

"It was determined by the Respondent that the Petitioner derived income of $18,349.00 on the payment made for the land computed as follows: [30]

Award received for portion condemned	$23,549.00
Cost of portion condemned	4,200.00
Difference	$19,349.00
Less Attorney fees	1,000.00
Taxable gain	$18,349.00

XI.

"In respect of the buildings the Petitioner sustained neither gain nor loss.

XII.

"Petitioner did not sell, exchange or otherwise dispose of the above described property, in 1929, except as stated above.

XIII.

"Further evidence may be offered by either party hereto. [31]

EXHIBIT 1
Original

"BUREAU OF ASSESSMENTS
of the City of Los Angeles
Room 34, City Hall
L. A. Wolf,
7840 Sunset Blvd.
Assessment Nos. 436 benefits for Opening and Widening of CAHUENGA AVE. and Other Streets Highland Ave. to Melrose Ave.
from..... to .....
Description—Lot E. part of Lot A and part of Lot 12 and part of Ivar Ave. Vacated.

2129
No. 82082
This receipt not valid
unless it is stamped
"Paid" in this space.
Board of Public Works
PAID
Mar. 20, 1929
H.L.F.
Cashier
Bureau of Assessments

Assessment	$19,470.32
Penalty	
Advertising	
Total	$19,470.32
Less Offset:	
S. J. No. 151	18,578.72
Net Cash	$ 891.60

List your property with the City Clerk, Room 6, City Hall, then you will be notified when Special Assessments become due. [32]

EXHIBIT 2

Original

"BUREAU OF ASSESSMENTS
of the City of Los Angeles
Room 34, City Hall

L. A. Wolf,
7840 Sunset Blvd.

Assessment Nos. 398 benefits for Opening and Widening of CAHUENGA AVE. and Other Streets Highland Ave. to Melrose Ave.

from..... to .....

Description—Lot. W. part of Lot A & part of Lots 5 and 12

2129
No. 82044
This Receipt not valid
unless it is stamped
"Paid" in this space.
Board of Public Works
PAID
Mar 20, 1929
H.L.F.
Cashier
Bureau of Assessment

Assessment	$19,243.28
Penalty	
Advertising	
Total	$19243.28
Less Offset:	
S. J. No. 151	19,243.28
Net Cash	None

List your property with the City Clerk, Room 6, City Hall, then you will be notified when Special Assessments become due. [33]

EXHIBIT 3

Los Angeles, Cal., March 13, 1931.

BILL FOR STREET ASSESSMENT

In City of Los Angeles, California.

"Mr. Louis A. Wolf
7840 Sunset Blvd.,
Hollywood, Calif.

Payable to
DISTRICT BOND COMPANY
Suite 603 Title Insurance Building
433 South Spring Street
Los Angeles, Cal.

This bill covers assessment against the property listed for improvement designated below. Payment must be made at the above office before expiration date, otherwise assessment becomes subject to terms of law as shown on reverse side of this bill. If

you are not the owner of the property described, or acting on behalf of the owner, kindly return the bill to us.

Assmt. No.	Lot	Block	Tract	Amount
248	That portion of Lot A, Tract No 2129 M.B. 24, Page 68, lying Ely. of Ivar Avenue			$1,317.20

Apr 13 1931

If immediate receipt is desired, make payment with cash, certified check or cashier's check.

For Improvement of	(Cahuenga Blvd.) (& Yucca Street) (Improvement) (District - Pav-) (ing, Sidewalks,) (Storm Drain, etc.)	Recorded in Book 179 Page 245	(Interest (to (Date..... (Total $.....

Important:

If you have not already done so, you should list your property, if in the City of Los Angeles, with the City Clerk, City Hall; or if in the County of Los Angeles, with the County Surveyor, 5th floor, Klinker Bldg. Give full legal description, together with your name and address, so that you may be notified of any special assessments against your property.

April 13, 1931
PAID
DISTRICT BOND CO.
By Ruth Hurley

If remitting by mail please enclose this bill.

EXHIBIT 4

"Los Angeles, Cal., Mar 13 1931

BILL FOR STREET ASSESSMENT

In City of Los Angeles, California.

Mr. Louis A. Wolf,
7840 Sunset Blvd.,
Hollywood, Calif.

Payable to
DISTRICT BOND COMPANY
Suite 603 Title Insurance Building
433 South Spring Street
Los Angeles, Cal.

This bill covers assesment against the property listed for improvement designated below. Payment must be made at the above office before expiration date, otherwise assessment becomes subject to terms of law as shown on reverse side of this bill. If you are not the owner of the property described, or acting on behalf of the owner, kindly return the bill to us.

Assmt. No.	Lot	Block	Tract	Amount
146	That part of Lot A, lying W'ly 2129 of Ivar Avenue. M.B. 24-P. 68			$1,315.55

DUPLICATE BILL Apr 13 1931

If immediate Receipt is Desired, Make Payment with Cash, Certified Check or Cashier's Check.

For Improvement of	(Cahuenga Blvd.) (& Yucca Street) (Improvement) (District - Pav-) (ing, Sidewalks,) (Storm Drain, etc.)	Recorded in Book Page	(Interest (to (Date..... (Total $.....

Important:

If you have not already done so, you should list your property, if in the City of Los Angeles, with the City Clerk, City Hall; or if in the County of Los Angeles, with the County Surveyor, 5th floor. Klinker Bldg. Give full legal description, together with your name and address, so that you may be notified of any special assessments against your property.

April 13, 1931
PAID
DISTRICT BOND CO.
By Ruth Hurley

If remitting by mail please enclose this bill.
Last day to pay—Apr. 13 1931." [35]

The parties entered into an oral stipulation, before the Board, as follows: "The Petitioner ex-

pended in 1929 and 1930, $6,809.98 in the necessary demolition, alteration, and refacing of buildings standing on the property involved in this proceeding. The $10,267 mentioned in the written Stipulation, as being for buildings taken, was among other things, intended to cover this work."

The Board, upon motion of Petitioner, permitted Petitioner to file an Amended Petition, with the understanding that all the material allegations thereof were to be considered as denied by Respondent.

The parties also stipulated that the Board might take judicial notice of the ordinances of the City of Los Angeles, under which the condemnation proceeding in question was instituted, and of any part of this proceeding, that is, the complaint and the judgment or award or any part of the official records of this condemnation proceeding; that any parts of the ordinances and/or the condemnation proceeding in question as set out in the briefs of the parties could be considered in evidence in the case.

In addition, L. H. Wolf, the Petitioner, was called as a witness in his own behalf, and, having been first duly sworn, was examined and testified as follows:

TESTIMONY OF L. H. WOLF
for Petitioner

My name is L. H. Wolf. I am the Petitioner in this case.

I own the property in Hollywood, California, described as Lot "A," Tract 2129, Map Book 24,

Page 68. I acquired the property in 1920, and made improvements thereon, totaling approximately $75,000, subsequently. [36]

The lower floor of the building in the front of the lot was occupied by stores, the second story by a hotel; the buildings in the rear were occupied by an automobile repair shop, a nickel plating works, a laundry loading station, and a storage room.

The portion of my property affected by the opening of Ivar Avenue was, both before and after such opening, in a light manufacturing district. The community has not been improved or built up since the opening of Ivar Avenue.

I did not vote or petition for the creation of the special assessment district which was the basis for the opening of Ivar Avenue through my property.

The foregoing evidence is all of the material evidence adduced at the hearing before the United States Board of Tax Appeals, and the same is approved by counsel for Petitioner.

MELVIN D. WILSON (Signed)
819 Title Insurance Building,
Los Angeles, California.

HOMER HENDRICKS (Signed)
920 Southern Bldg.,
Washington, D. C.
Counsel for Petitioner on Review.

The foregoing is all of the material evidence adduced at the hearing before the United States Board

of Tax Appeals, and the same is approved by the undersigned as Attorney for the Respondent on review, the Commission of Internal Revenue,

ROBERT H. JACKSON (Signed)
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

[Endorsed]: Approved and ordered filed this 17th day of May, 1934.

(Signed) ERNEST H. VAN FOSSAN,

[Endorsed]: United States Board of Tax Appeals. Filed May 17, 1934. [37]

[Title of Cause.]

MOTION FOR TRANSMISSION OF THE ORIGINAL EXHIBITS.

On Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

(B.T.A. Docket No. 63,589)

To the United States Circuit Court of Appeals for the Ninth Circuit:

To the United States Board of Tax Appeals:

Now comes the petitioner, by his attorneys, and respectfully shows—

(1) That the final decision in the above-entitled cause was rendered on January 11, 1934, determining a deficiency in income taxes for the calendar year 1929 in the amount of $1,249.44.

(2) That a petition for review to the United States Circuit Court of Appeals for the Ninth Circuit was filed and served on April 2, 1934, and that the praecipe for the record will be filed and served in the near future, and that the Statement of Evidence is being settled.

(3) Exhibit 5 is a blue print map entitled "Layout of L. H. Wolf Buldings, showing changes caused by cutting thru of Ivar Street."

Exhibit 6 is a blue print map of the district.

Exhibit 7 consists of printed maps showing "land to be condemned," etc. [38]

All the foregoing exhibits were received in evidence at the hearing.

The said exhibits are too large for inclusion in the record, cannot be summarized, and are of importance in aiding the Appellate Court to obtain a full understanding of the facts, and it is, therefore, necessary and proper that said exhibits be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit for inspection by that Court upon its review of these proceedings.

(4) This motion is made pursuant to Rule 34 and Rule 38 (6) of the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, the petitioner prays that this Honorable Board may transmit the said Exhibits 5, 6 and 7 to the United States Circuit Court of Appeals for the Ninth Circuit for the inspection

by that Court upon review of these proceedings.

MELVIN D. WILSON (Signed)
819 Title Insurance Bldg.,
Los Angeles, California.
HOMER HENDRICKS (Signed)
920 Southern Bldg,
Washington, D. C.
Attorneys for Petitioner.

No objection
ROBERT H. JACKSON

[Endorsed]: Granted May 17, 1934.
(Signed) ERNEST H. VAN FOSSAN,
Member U. S. Board of Tax Appeals

[Endorsed]: United States Board of Tax Appeals. Filed May 15, 1934. [39]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

TO: The Clerk of the United States Board of Tax Appeals:

Please prepare and issue a certified transcript of record in the above entitled cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following documents.

(1) The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.

(2) Pleadings before the Board, as follows:
  (a) Petition.
  (b) Answer of Respondent.
  (c) Amended Petition.
(3) Opinion, and decision of the Board. [40]
(4) Petition for Review
(5) Statement of the evidence agreed upon, including exhibits.
(6) Motion for Transmission of the Original exhibits.
(7) This Praecipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

MELVIN D. WILSON (Sgd.)
819 Title Insurance Bldg.,
Los Angeles, California
HOMER HENDRICKS (Sgd.)
920 Southern Bldg,
Washington, D. C.
Counsel for Petitioner.

Dated: May ....., 1934.

Service of the foregoing Praecipe for Transcript of Record on Appeal is hereby accepted this 15th day of May, 1934.

ROBERT H. JACKSON (Sgd.)
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

[Endorsed]: United States Board of Tax Appeals. Filed May 15, 1934. [41]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 41, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 24th day of May, 1934.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeal.

[Endorsed]: No. 7504. United States Circuit Court of Appeals for the Ninth Circuit. L. H. Wolf, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed May 29, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Docket No. 7504.

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. H. Wolf,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

MELVIN D. WILSON,
Counsel for Petitioner,
819 Title Insurance Building,
Los Angeles, California.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

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Text Books and Encyclopedias.

INDEX TO APPENDIX.

Docket No. 7504.

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. H. Wolf,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

This case comes before the Court on a petition for a writ of review of a decision and order of the United States Board of Tax Appeals determining a deficiency in the Federal income tax of Petitioner for the year 1929 in the amount of $1,249.44. The Board's order was entered on January 11, 1934.

QUESTIONS INVOLVED.

1. Did Petitioner have a closed transaction in which gain was realized when a street was cut through his property and his portion of the cost of the improvement exceeded the award for the land taken, and both the assessment and the award were authorized by the same Statute and he did not otherwise dispose of his property?

2. If a closed transaction resulted from the condemnation of the right of way for the street, is the Petitioner entitled to add to the cost of the property condemned, a part of the improvement assessment which was paid?

3. If a profit was realized from this transaction, then do the non-recognizing provisions of *Section* 112(f) of the Revenue Act of 1928 apply?

STATEMENT.

The facts are not in dispute. Nearly all the facts were stipulated. Additional evidence was uncontradicted.

In 1920, Petitioner acquired a parcel of property located in Hollywood, California. The cost of such property was Twenty-one Thousand Dollars ($21,000.00). [Tr. pp. 30-31.] The property was 103 feet wide, fronting on Cahuenga avenue and 383 feet deep. [Tr. p. 31.]

Between 1920 and 1925, Petitioner constructed various buildings on the property at a cost of $75,000.00. [Tr. p. 41.] The buildings covered the entire lot, except for a driveway through the property. A two-story brick building stood on the front portion of the lot. The second

story was built over the driveway. A smaller frame and stucco building was on the rear of the lot. [Tr. p. 31.]

In 1929, the City of Los Angeles, for the purpose of opening up Ivar avenue, a public thoroughfare, condemned a strip 70 feet wide running diagonally across the approximate center of Petitioner's land. This strip represented 20 per cent of the total area of Petitioner's property. By Ordinances No. 53214 (approved November 10, 1925), and No. 54065 (approved February 24, 1926), the City of Los Angeles created a special improvement district and the condemnation proceedings and improvements herein referred to, were made pursuant thereto. [Tr. p. 31.] These proceedings were taken under the provisions of the Street Opening Act of 1903.

By order of Court, Petitioner was awarded the following amounts:

(1) Award for buildings taken	$10,267.00
(2) Award for the land taken	23,549.00
(3) Award for severance damages for the balance of land not taken	4,006.00
Total	$37,822.00

[Tr. pp. 31-32.]

The City of Los Angeles levied special assessments for opening and widening work on the newly created street adjacent to parcels of Petitioner's property in the amounts

of $19,470.32 and $19,243.28, respectively, totaling $38,-713.60. [Tr. p. 32.]

Petitioner in 1929 paid the special assessments amounting to $38,713.60, by applying the awards amounting to $37,822.00, against assessments and paying the balance of $891.60 in cash. [Tr. p. 32.]

In 1931, the City of Los Angeles levied, and the Petitioner paid further special assesments on the two newly created parcels of $1,317.20, and $1,315.55 for the paving, sidewalks, storm drain, etc., along Ivar avenue, occasioned by the opening of said avenue in 1929. [Tr. p. 32.]

In 1929, Petitioner paid $1,000.00 attorney's fees in connection with the said awards and special assessments. [Tr. p. 33.]

It was determined by the Respondent that the Petitioner derived taxable income of $18,349.00 on the payment made for the land computed as follows:

Award received for portion condemned	$23,549.00
Cost of portion condemned	4,200.00
Difference	$19,349.00
Less attorney's fees	1,000.00
Taxable gain	$18,349.00

[Tr. p. 33.]

No part of the special assessments were included in the cost of $4,200.00.

In respect of the buildings the Petitioner sustained neither gain nor loss. [Tr. p. 33.]

Petitioner did not sell, exchange or otherwise dispose of the above described property, in 1929, except as stated above. [Tr. p. 33.]

The Petitioner expended in 1929 and 1930, $6,809.98 in the necessary demolition, alteration and refacing of buildings standing on the property involved in this proceeding. The $10,267.00 mentioned in the written stipullation, as being for buildings taken, was among other things, intended to cover this work. [Tr. pp. 39-40.]

The portion (rear) of Petitioner's property affected by the opening of Ivar avenue was, both before and after the said opening, in a light manufacturing district. The community has not been improved or built up since the opening of Ivar avenue. [Tr. p. 41.]

Petitioner did not vote or petition for the creation of the special assessment district which was the basis for the opening of Ivar avenue through his property. [Tr. p. 41.]

Twenty per cent of the 1929 special assessment (applicable to the strip which represented 20 per cent of the land) was $7,742.72. [Tr. par. IV, p. 31, par. VI, p. 32.]

SPECIFICATION OF ERRORS RELIED ON.

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1929.

2. The Board of Tax Appeals erred as a matter of law in deciding that Petitioner realized any taxable income in 1929 arising out of the involuntary condemnation of his property.

3. The Board of Tax Appeals erred in deciding that there was a closed transaction in 1929.

4. The Board of Tax Appeals erred in finding that Petitioner derived cash or anything else from his property in 1929, as a result of its involuntary conversion.

5. The Board of Tax Appeals erred in failing to find that Petitioner's property was involuntarily converted into other property similar or related in service or use to the property so converted.

6. The Board of Tax Appeals erred in failing to find that Petitioner reinvested the proceeds of the involuntary conversion of his property in the acquisition of other property similar or related in service or use to the property so converted.

7. The Board of Tax Appeals erred in failing to find that the rental value of Petitioner's property was decreased by the transaction involved.

8. The Board of Tax Appeals erred in failing to find that the character of Petitioner's property was not im-

proved by the opening of Ivar avenue through Petitioner's property.

9. The Board of Tax Appeals erred in failing to find that the sidewalk on Ivar avenue was graded and paved about two feet below the level of the floors in Petitioner's buildings.

10. The Board of Tax Appeals erred in its decision and determination of a deficiency of $1,249.44 for the taxable year 1929.

11. The Board erred in rendering decision for the Respondent. [Tr. pp. 27-28.]

STATUTES INVOLVED.

Section 112 (f), Revenue Act of 1928, provides:

> "Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be

recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

Section 113 (a) of the Revenue Act of 1928 provides:

"Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; . . ."

Pertinent sections of the *Street Opening Act of 1903* are set out in the appendix. The substance of the sections of the *Street Opening Act of 1903,* bearing on this case, is as follows:

The Act provides for the bringing of a suit to condemn property for public improvements; for the entry of an interlocutory decree fixing the amount of the awards for the property taken or damaged; for the assessment by the Street Commissioner against properties benefited in the amount necessary to pay the awards and the cost of the work. The Act provides that after the assessments are collected and the awards paid therefrom, a final judgment will be entered directing that the interlocutory decree be satisfied, and condemning the lands described in the complaint. The Act provides that the property owner may, at his request, have the award offset against the assessment.

ARGUMENT.

I.

Petitioner Did Not Have a Closed Transaction and Did Not Derive a Profit When the City of Los Angeles Involuntarily Took a Strip of His Property and Required Him to Pay an Assessment Greater by $15,164.60 Than the Award for the Land Taken.

This was not a simple case in which land which cost $4,200 was sold for $23,549, because the city, after acquiring the land, had the right to and did charge the Petitioner's land for opening and widening work, in the sum of $38,713.60. The net result was an out-go, and it was impossible for Petitioner to get the $23,549.00 from the city without paying the $38,713.60 to the city, for work on its newly acquired street. It is one thing if the owner of property is able to sell it for $23,549.00 without any obligation on his part to spend money for improvements on the property sold, and quite another thing if he has to spend money improving the property *after he has disposed of it.* To say that the income-result is the same in these two utterly different situations is to violate common sense.

In this case it was absolutely impossible for him to get the $23,549 without expending a larger amount for improvements on the land which he was disposing of.

If a taxpayer cannot sell his property without promising to build a house on it for the purchaser, clearly the cost of building the house must be taken into account before we determine what the gain or loss is, if any, to the seller. While the transaction in the present case is a compulsory transaction, it still remains true that the only

reason for the condemnation was the *bona fide* intention of the city to open an improved street—the very circumstance out of which Petitioner's cross-liability arose.

Relatively early in the administration of tax law, a difference was recognized between (1) a disposition of property without any further obligation on the part of the seller and (2) a disposition in which the disposer is encumbered with an unconditional obligation to spend money. Thus, when a developer of real estate sold lots before development was completed, covenanting that streets, sewers, shade trees, etc., should in due time be installed by the seller, the Bureau of Internal Revenue held that in determining gain or loss the estimated cost of the improvements should be taken into account. C. B. 1, p. 76, O. D. 226; C. B. 3, p. 108, O. D. 567. See also *Milton A. Mackay,* 11 B. T. A. 569, 573, and *Birdneck Realty Corporation,* 25 B. T. A. 1084.

Thus, during the period when there was no express provision in the tax law on this subject, the adjustment was made by adding to the original cost the estimated cost of the improvements which were to be made at the seller's expense though for the benefit of the property he was disposing of. Thus the latter of the above cited rulings (C. B. 3, p. 108, O. D. 567) provides:

> "Profit realized on the sale of lots, the selling price of which includes the cost of certain development work already made or to be made in accordance with the contract of sale, should be based on the cost of the land to the vendor, or its fair market value as of March 1, 1913, if acquired prior to that date, plus the actual and estimated future expenditures for development."

At length, in the Revenue Act of 1926, there was inserted in the law a specific provision (Section 214 (a) (11)):

> "In the case of a casual sale or other casual disposition of real property, a reasonable allowance for future expense liabilities, incurred under the provisions of the contract under which such sale or other disposition was made, under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, including the giving of a bond, with such sureties and in such sum (not less than the estimated tax liability computed without the benefit of this paragraph) as the Commissioner may require, conditioned upon the payment (notwithstanding any statute of limitations) of the tax, computed without the benefit of this paragraph, in respect of any amounts allowed as a deduction under this paragraph and not actually expended in carrying out the provisions of such contract."

This provision has been repeated in subsequent Revenue Acts. It is referred to here not because Petitioner claims to come expressly within its terms, but because it is illustrative of a broader principle fully recognized before 1926, when this express provision was first enacted, and still in effect.

It does not seem possible that Petitioner could have realized a taxable profit when forced to pay $15,164.60 to have a street cut through his property, yet that is all that in substance occurred in this case.

The fact that the Petitioner had the street forced upon him, is not important in deciding whether there was income or not. Le us suppose that the Petitioner had built

the street in order to enhance the value of his property, and had dedicated the street to public use. Plainly, in such a case, no profit would be realized and the transaction would be regarded as in the nature of a capital expenditure for permanent improvements, which would affect gain or loss only when the owner sold the rest of his property out of which the highway had been carved.

To differentiate the situation in this case from that last above stated, is to reach a harsh and unnatural result which Congress nowhere has specifically indicated should be productive of taxable gain. The capital nature of the transaction makes it quite clear that an attempt by Congress to tax income out of the situation described would be unconstitutional and void.

It was entirely erroneous for the Commissioner to attempt to make the condemnation and assessment separate and distinct events. The transaction was a single one between the Petitioner on one side and the city of Los Angeles on the other, and consisted of a taking of part of his lot for a highway and the assessing against him of his share of the costs of acquiring the land and building the street, the assessment being an integral part of the plan from the start, and not susceptible of divorcement through any act of the city officials.

In *Carrano v. Commissioner,* 70 Fed. (2d) 319, the United States Circuit Court of Appeals for the Second Circuit considered a case involving circumstances similar to those in this case, *except that there the award was greater than the benefit assessments which were paid out of the award.* The court recognized the singleness of the condemnation and the benefit assessments, and held that

they occurred simultaneously and must be considered together, saying:

> "In this instance the 'gain' in dispute could arise only on the hypothesis that so much of the award as paid the assessment was received before the assessment itself was paid. This was demonstrably not the case; it was received at the same time. Thus it does not affirmatively appear to be a taxable 'gain' at all, and the taxpayer wins. Moreover, this is the direct and natural way to look at the transaction. The taxpayer has 'gained' only what he has received above his cost; so far as his award has been cancelled by the assessment, it is not a 'gain' at all, it is instantly absorbed by a new cost which arises and is paid without allowing him even a momentary possession of the 'gain'."

For other cases in which income was not recognized because contractually tied up with a disbursement, see *Mellon v. U. S.*, 279 Fed. 910, affirmed 281 Fed. 645, and *U. S. v. Davison*, 9 Fed. (2d) 1022, Cert. denied 271 U. S. 670, where dividends were not taxed but were treated as stock dividends because of an agreement to apply them to stock subscriptions. In *Irving v. U. S.*, 44 Fed. (2d) 246 (Court of Claims) the above cases were followed, even though dividend checks were actually issued.

An example of how the Supreme Court looks at an entire transaction and will not permit it to be torn apart to get a highly technical result, is shown in *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170. There the taxpayer repaid a loan, at a large apparent profit, with depreciated currency. The Supreme Court decided that

there was no taxable income because the borrowed money had been lost in business and the entire venture resulted in a loss rather than a profit.

In *Burnet v. Sanford & Brooks Company,* 282 U. S. 359, the Supreme Court took within its view, circumstances occurring over a period of years, in determining whether money received in 1920 was income. The court held that the receipt in 1920 was not income, as it merely reimbursed the taxpayer for losses incurred in earlier years, even though those losses had been deducted in the earlier years' tax returns.

See, also, *Drier v. Helvering,* 72 Fed. (2d) 76, where interest received on a claim against Germany was held not to be income, for the reason that the principal and interest received did not exceed the cost of the stock taken by Germany during the war.

The entire transaction was involuntary so far as Petitioner was concerned, and both aspects of it were carried out under the same law, the *"Street Opening Act of 1903" of California, Stats.* 1903, *page* 376. The Act provides for the bringing of a suit to condemn property for public improvements, for the entry of an interlocutory decree fixing the amount of the awards for the land taken, the assessment by the street commissioner of the amount necessary to pay for the land taken and the cost of the opening. The Act provides that after the assessments are collected and the awards paid therefrom, a final judgment will be entered directing that the interlocutory judgment be satisfied, and condemning the lands described in the complaint. The Act provides that the property owner may have the award offset against the assessment.

It is clear from the above analysis of the Street Opening Act of 1903, that:

1. The award and the assessment are part of the same transaction.
2. The award is paid out of the assessment.
3. Petitioner, in effect, paid his own award.
4. Petitioner in substance and effect gave up 20 per cent of his land and paid $15,164.60 to have a street cut through his lot.
5. The sum of $23,549 was not *severed from* Petitioner's land and paid to and *received* by Petitioner for his own *seperate* use, benefit and *disposal,* and is not income. See *Eisner v. Macomber,* 252 U. S. 189.

The award does not satisfy the definition of income laid down by the Supreme Court in *Eisner v. Macomber, supra,* page 207:

> "Income may be defined as the gain derived *from* capital, from labor, or from both combined."
>
> "Brief as it (the above definition of income) is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either over-

looked or misconceived. *'Derived—from—capital';* —'the *gain—derived—from—capital,'* etc. Here we have the essential matter; *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in,* being *'derived'*,—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." (Emphasis supplied by the Court.)

Income is generally realized either in money or property. In the instant case, so far as money is concerned, it is plain that the Petitioner did not actually come into possession of any money. All that he received was a credit upon the assessment which he was obligated to pay to the City of Los Angeles, by reason of its procedure against his property for the acquisition of a highway across it. If by this credit he received money, then he paid that money to himself, and paid $15,164.60, in addition, to others.

So far as property is concerned, Petitioner did not receive a new piece of property which might be income to the extent of its value. There may have been an increase in the value of his old property, but he did not realize upon such increase by a sale, and "a growth or increment of value in the investment" is not income until realization. The new property he did receive, the easement to have

a street maintained through his lot, was purchased with the property he gave up and fresh money put up by him in the amount of $15,164.60.

Therefore, Petitioner did not realize income, either in cash or in property. By so holding, the Court will not be permitting income to escape taxation. The award will reduce Petitioner's cost of the lot. His total investment in the land, as distinguished from the buildings was, at the end of 1929, $59,713.60 ($21,000 plus $38,713.60). He has recovered part of his capital, namely, the award of $23,549. Hence, his net cost is $36,164.60. When he sells the lot his profit will be greater, or his loss smaller, by $23,549, than it would have been if he had not received the award.

Any *theory* which would require Petitioner to pay a tax on a profit from this transaction would be subject to the criticism that it was unreasonable, unjust, and arbitrary. It would shock the conscience of the man in the street, and would violate his conception of fairness. The award and the assessment were inseparable parts of the same transaction and the net result was an additional investment rather than the severance of any profit.

Petitioner did not come out of the transaction with anything that he could pay the proposed income tax with. Any tax he would pay would have to come out of his other property, if any, and would be a tax, not on income, but on property. He surely did not receive any income.

II.

The Cost of and the Profit on the Strip Taken Should Be Increased by $7,742.72, Which Is 20 Per Cent of the Assessment Paid for the Street Improvement.

Should the Court rule that taxable income was realized by Petitioner, then it will be necessary to determine the amount of such income.

The lot cost $21,000 and 20 per cent of it was taken. Before the condemnation became final, however, an assessment of $38,713.60 was levied on Petitioner's lot. At least 20 per cent of this should be allocated to the strip taken. This was not done by the Respondent. The cost of the strip should be increased $7,742.72, and the profit should be reduced by the same amount.

This conclusion seems well supported by the decision of the United States Circuit Court of Appeals for the Second Circuit, in the case of *Carrano v. Commissioner,* 70 Fed. (2d) 319, in which the Court added the entire assessment to the cost of the land taken. The Solicitor General has announced that no petition for Writ of *Certiorari* will be filed in that case. (Page 233, *Prentice Hall 1934 Federal Tax Service.*)

III.

If the Condemnation Award and the Benefit Assessments Are Separable, and an Apparent Profit Was Realized, Then Such Profit Is Non-taxable Under Section 112(f) of the Revenue Act of 1928.

In so far as time is concerned, the award and the assessment must have had one of the following relationships:

1. The assessment was first (in which event the cost of the strip taken should be increased and the profit decreased by at least $7,742.72).
2. They were simultaneous (in which event there was no closed transaction, but only an additional investment of $15,164.60).
3. The award was first (in which event it was expended in the assessment, which renders the profit non-taxable as will be shown hereinafter.)

Whatever the order of accrual, there can be no doubt but that the award went to help pay the assessment.

What did Petitioner receive by paying the assessment? He received real estate; he received real estate which became a part of or related to the real estate retained; he received real estate which helped produce rental income in place of the income producing real estate he gave up; he received other property *similar or related in service or use to the property given up.*

The nature of Petitioner's interest in the street is stated in 29 *Corpus Juris* 547, as follows:

> "An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys

> in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he may not be deprived without his consent, except upon full compensation and by due process of law. They include the easement of access, and of light and air, the right to lateral support, and the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel."

See, also:

44 *Corpus Juris* 942;

Williams v. Los Angeles Railway Company, 150 Cal. 592; 89 Pac. 330.

Such rights as access, light, air, lateral support and the right to have the highway kept open, are easements or incorporeal things real and are real estate. (*Tiffany Real Property,* page 8, page 677, page 700; *Williams v. Los Angeles Railway Co., supra.*)

What did Petitioner give up in exchange for the award? He gave an easement for the public to have a right of way through his land. He retained the fee of the land. (*People v. Marin County,* 103 Cal. 223; 37 Pac. 203; *Levee Dist. No. 9 v. Farmer,* 101 Cal. 178; 35 Pac. 569; 13 *Cal. Jur.* 364; 29 *Corpus Juris* 540.)

Petitioner then gave up an easement, and acquired an easement. The easement he gave up was to allow the public to cross over his lot. The principal easement he acquired was the right to have the thoroughfare main-

tained alongside his remaining property. (29 *Corpus Juris* 547.) The easement acquired is "other property", but is similar or related to the easement given up.

Both easements had to do with his lot, as a whole. Both helped produce rental income. Both were supplements of the same parcels of property, namely, the remaining pieces of the original lot.

Petitioner gave up the right to derive rental income from the central portion of his lot. He acquired a right which presumably increased the rental income of the two remaining portions of the lot.

The two easements are similar because both are real estate and both are rent producing properties.

The two easements are related because they both supplement the remaining parcels; both have to do with the rental income of the entire lot.

In considering whether the award was invested in the acquisition of "other property similar or related in service or use" to the property taken away, it is urged that the Court take as liberal a view of the law and facts as possible. There are a number of reasons for this.

In the first place, Section 112(f) was inserted in the law to give relief to taxpayers who have realized profits involuntarily, through the action of a governmental body or natural force. The section should therefore be so construed liberally lest the beneficent intent of Congress might be thwarted. See *U. S. v. United Shoe Machinery Co.*, 264 Fed. 138; 57 Corpus Juris 1107. Certainly the case at bar is within the reason of the statute, and should therefore be given the benefit of the statute. 57 Corpus Juris 1109. The Board itself has recognized that the

sections dealing with involuntary conversions are remedial provisions. In *Washington Market Co.,* 25 B. T. A. 576, 584, the Board said:

> "As we view it, Section 203(b) (5) (Revenue Act of 1924) is a special or relief provision designed to prevent an inequitable incidence of taxation, perhaps to prevent the very action that is here proposed."

In another case the Board correctly said:

> ". . . it is from results rather than methods that the allowance or disallowance of deductions under Section 234(a) (14) (Revenue Act of 1921) must be determined."
>
> *Excelsior-Leader Laundry Co.,* 8 B. T. A. 183, 189.

Certainly Congress would wish to prevent the inequity of the tax proposed on Petitioner under the circumstances of this case. He has suffered too much, financially, in the transaction already. He is already "out" $15,164.60 cash plus 20 per cent of his land and buildings, on this involuntary exaction.

In the second place, it is urged that the Court be liberal in considering whether there was a reinvestment satisfying the statute, because Petitioner did not have a chance to exercise his judgment in making the reinvestment. If the City of Los Angeles had paid him $23,549 without charging him a greater sum, or any sum at all, he could have purchased "other property similar or related in service or use" beyond the shadow of a doubt. He could have purchased another lot, which, presumably, would have satisfied the statute. But the City required Petitioner, whether he thought it was a good investment or not, or

whether he had the money or not, or whether he thought it "other property similar or related in service or use," to buy the "street" through his lot.

Finally, in considering this question there should be applied the familiar principle that all doubts concerning the applicability of a taxing statute should be construed strictly against the Government and in favor of the taxpayer.

Gould v. Gould, 245 U. S. 151.

Since all of the award was reinvested in other similar or related property, none of the profit is taxable. This does not mean that any taxable income will escape tax. The award received will reduce Petitioner's cost and his profit on the subsequent sale will be correspondingly increased, or his loss decreased.

CONCLUSION.

The law and facts of the case warrant the following conclusions:

1. The award and the assessment both arose under one statute, one proceeding, one ordinance; they are parts of one transaction.
2. The substance of the transaction was an investment by Petitioner; not a closed transaction, but one side only.
3. Petitioner did not derive a clear, detached, enjoyable gain from the property in the constitutional sense.

4. If any gain is recognized it should be reduced by the additional cost of the strip taken, represented by at least 20 per cent of the assessment.
5. Petitioner expended the entire award in the acquisition of other property similar or related in service or use to the property taken.
6. In granting any of Petitioner's contentions, no income will escape taxation—it will merely be postponed until there really is taxable income.
7. Congress wished to prevent hardship in the case of involuntary conversions, and the law should be liberally interpreted or a gross injustice will occur in this case.
8. This transaction comes within the spirit and the letter of *Section 112(f)*.
9. The order of the Board of Tax Appeals should be reversed.

Respectfully submitted,

MELVIN D. WILSON,
Counsel for Petitioner,
819 Title Insurance Building,
Los Angeles, California.

January, 1935.

APPENDIX.

THE FOLLOWING EXCERPTS FROM THE STREET OPENING ACT OF 1903, CALIFORNIA STATS. 1903, P. 376, APPROVED MARCH 24, 1903, AS AMENDED, ARE PERTINENT TO THIS CASE.

"Order for improvement.

"Sec. 5. Having acquired jurisdiction, the city council, shall, by ordinance, order said improvement to be made, and direct an action to be brought by the city attorney, in the proper superior court, in the name of the municipality, for the condemnation of the property necessary or convenient to be taken therefor. Such ordinance need not describe the property to be taken, nor the assessment district, but may refer to the ordinance of intention for all particulars."

"Assessment of damages. Findings.

"Sec. 10. For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act. No improvements placed upon the property proposed to be taken, subsequent to the date of the publishing of the notice of the passage of the ordinance of intention, shall be included in the assessment of compensation or damages.

"The referees, or court, or jury, as the case may be, shall find separately:

"First. The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein;

"Second. If any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Such damages must be fixed irrespective of any benefit from such improvement. (Amendment approved April 21, 1909, Stats. 1909, p. 1038.)"

"Confirmation of report. Interlocutory judgment. Compensation of referees.

"Sec. 12. Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the cost allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint. The court shall allow to the referees, as costs to be paid by the plaintiff, a reasonable compensation for their services, the amount of which compensation shall be fixed by the court upon the hearing of the report, and

their necessary expenses. (Amendment approved April 21, 1909, Stats. 1909, p. 1040.)"

"Delivery of diagram. Completed assessment.

"Sec. 16. The city engineer shall deliver said diagram to the street superintendent and shall endorse thereon the date of such delivery. The street superintendent upon receiving the said diagram shall proceed to assess the total expenses of the proposed improvement (first deducting from such total expenses such percentage thereof, if any, as the city council may have declared by the ordinance of intention that the city shall pay) upon and against the lands, including the property of any railroad or street railroad, within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for completing said assessment for a period not exceeding ninety days additional. The total expense of the improvements so to be assessed shall include the amounts awarded to the defendants by the interlocutory judgment in the action for condemnation, together with their costs, the compensation and expenses of the referees, as allowed by the court, and all other costs of the plaintiff in such action, the expenses of making the assessment, and all expenses necessarily incurred by said city, in connection with the proposed improvement, for the publication of ordinances, posting and publication of notices, for maps, diagrams, plans, surveys, searches and certificates of title to the property to be taken, and all other matters incident thereto. (Amendment approved June 10, 1913, Stats. 1913, p. 433. In effect August 10, 1913.)

"This section was also amended April 21, 1909, Stats. 1909, p. 1040."

"Record of assessment.

"Sec. 20. The clerk of the council shall thereupon deliver to the street superintendent the assessment as confirmed by the city council, with his certificate of such confirmation, and of the date thereof. The street superintendent shall thereupon record such assessment and diagram in his office, in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment roll. Immediately upon such recording, the several assessments contained in such assessment roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made."

"Payment by offset.

"Sec. 21. The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for nonpayment thereof, as hereinafter provided, demand of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked 'Paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to

the street superintendent in money, and the assessments shall, on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money. In either case, as a condition of the offset, such person must execute to the city and deliver to the street superintendent duplicate receipts for such part of the amount due him under said interlocutory judgment as is offset against such assessments, penalties, and costs. One of said duplicate receipts shall be filed by the street superintendent in his office, the other shall be filed with the clerk of the superior court, and on such filing, the city shall be entitled to a satisfaction *pro tanto* of said interlocutory judgment."

"Notice to pay. Delinquency.

"Sec. 22. The street superintendent shall, upon the recording of said assessment, give notice, by publication for ten days in a daily newspaper, published and circulated in such municipality, or by three successive insertions in a weekly newspaper, so published and so circulated, that said assessment has been recorded in his office, and that all sums assessed therein are due and payable immediately, and that the payment of the said sums is to be made to him within thirty days after the date of the first publication, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto. When payment for any assessment is made, the street superintendent shall mark opposite such assessment, the word, 'paid,' the date of payment, and the name of the person by or for whom the same is paid, and shall, if so

requested, give receipt therefor. On the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment roll, and mark each such assessment 'delinquent,' and add five per cent to the amount of each assessment delinquent."

"Receipts paid into special fund.

"Sec. 30. The street superintendent shall from time to time pay over to the city treasurer all moneys collected by him on account of any assessment made under the provisions of this act. The city treasurer shall on receipt thereof place the same in a special fund, designating such fund by the name of the improvement for which the assessment was made. The city council shall on or before the time when said assessments become delinquent, cause to be transferred from the general or other appropriate fund of the city to said special fund the percentage of the total expense of such improvement to be paid by the city as provided in the ordinance of intention. (Amendment approved June 10, 1913, Stats. 1913, p. 436. In effect August 10, 1913.)"

"Payment of awards. Final judgment.

"Sec. 31. As soon as there is sufficient money in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the amounts awarded to the defendants by the interlocutory judgment in the action of condemnation, or such parts thereof as have not been paid by offset against assessments, as hereinbefore provided, the said amounts shall be paid to the parties entitled thereto, or into court for their benefit. On satisfactory proof being made to the court of payment of the amounts awarded by the interlocutory judgment to the

respective parties entitled thereto, or into court for their benefit, it shall direct the interlocutory judgment to be satisfied, and shall make and enter a final judgment, condemning the lands described in the complaint to the use of the plaintiff for the purposes specified in such complaint."

"Proceedings in case of a deficiency.

"Sec. 32. In case of a deficiency in the fund for such improvement, the city council, in its discretion, may provide for such deficiency by an appropriation out of the general fund of the treasury, or by ordering a supplementary assessment to be made by the street superintendent upon the property in said assessment district in the same manner and form, and subject to the same procedure as the original assessment, and in the last named case, in order to avoid delay, the city council may advance such deficiency out of the city treasury and reimburse the treasury from the collections under such supplementary assessment. In case of a surplus in the fund for such improvement, the city council may order such surplus refunded pro rata to the parties who paid the assessments."

No. 7504

In the United States Circuit Court of Appeals for the Ninth Circuit

L. H. WOLF, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
EDWARD H. HAMMOND,
Special Assistants to the Attorney General.

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CITATIONS

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OPINION BELOW

The only previous opinion in this case is the unreported opinion of the United States Board of Tax Appeals (R. 16–20).

JURISDICTION

The petition for review in this case involves income taxes of $1,249.44 against L. H. Wolf for the year 1929, and is taken from a decision of the United States Board of Tax Appeals entered January 11, 1934 (R. 20–21). The case is brought to this Court by petition for review filed April 2, 1934 (R. 29), pursuant to Sections 1001–1003 of

the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTIONS PRESENTED

Part of petitioner's parcel of land was condemned by a municipality. The compensation awarded was greater than the cost. Assessments were made against the remainder of the parcel and petitioner exercised his option to set off the award against the assessments. Upon these facts the following questions arise:

1. Whether the profit on a disposition of part of a parcel of land is rendered nontaxable because the petitioner used the awards as offsets against assessments upon the remainder of the parcel.

2. Whether the application of the awards against the assessments can be said to constitute "the acquisition of other property similar or related in service or use" within the meaning of Section 112 (f), Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 17–24.

STATEMENT

There was a written stipulation as follows (R. 30–33):

I

In 1920 Petitioner acquired a parcel of property located in Hollywood, California,

described as Lot A, Tract 2129, Map Book 24, Page 68, Los Angeles County, California. That the cost of such property was Twenty-one Thousand Dollars ($21,000.00).

II

Between 1920 and 1925 Petitioner constructed various buildings on said property. The said buildings covered the entire lot, except for a driveway through the property. A two-story brick building stood on the front portion of the lot. The second story was built over the driveway. A smaller frame and stucco building was on the rear of the lot.

III

The property was 103 feet wide, fronting on Cahuenga Avenue and 383 feet deep.

IV

In 1929 the City of Los Angeles, for the purpose of opening up Ivar Avenue, a public thoroughfare, condemned a strip 70 feet wide running diagonally across the approximate center of Petitioner's land. This strip represented 20 percent of the total area of Petitioner's property. By Ordinances No. 53214 (approved November 10, 1925), and No. 54065 (approved February 24, 1926), the City of Los Angeles created a special improvement district and the condemnation proceedings and improvements herein referred to, were made pursuant thereto.

V

By order of Court Petitioner was awarded the following amounts:

(1) Award for buildings taken	$10,267.00
(2) Award for the land taken from Petitioner	23,549.00
(3) As severance damages for the balance of land not taken	4,006.00
Total	37,822.00

VI

The City of Los Angeles levied special assessments for opening and widening work on the newly created street adjacent to parcels of Petitioner's property in the amounts of $19,470.32 and $19,243.28, respectively, totaling $38,713.60.

VII

Petitioner paid the special assessments amounting to $38,713.60, by applying the awards amounting to $37,822.00, against assessments and paying the balance of $891.60 in cash. Copies of the Special Assessments are attached hereto and marked Exhibits 1 and 2.

VIII

In 1931, the City of Los Angeles levied, and the Petitioner paid further special assessments on the two newly created parcels of $1,317.20, and $1,315.55 for the paving, sidewalks, storm drain, etc., along Ivar Avenue, occasioned by the opening of said Avenue in 1929. Copies of the special assess-

ments are attached hereto and marked "Exhibits 3 and 4."

IX

In 1929, Petitioner paid $1,000.00 Attorney's fees in connection with the said awards and special assessments.

X

It was determined by the Respondent that the Petitioner derived income of $18,349.00 on the payment made for the land computed as follows:

Award received for portion condemned	$23,549.00
Cost of portion condemned	4,200.00
Difference	19,349.00
Less Attorney fees	1,000.00
Taxable gain	18,349.00

XI

In respect of the buildings the Petitioner sustained neither gain nor loss.

XII

Petitioner did not sell, exchange, or otherwise dispose of the above-described property, in 1929, except as stated above.

XIII

Further evidence may be offered by either party hereto.

In addition, the parties orally stipulated as follows (R. 39–40):

> The Petitioner expended in 1929 and 1930, $6,809.98 in the necessary demolition, alteration, and refacing of buildings standing on the property involved in this proceeding. The $10,267 mentioned in the written Stipulation, as being for buildings taken, was among other things, intended to cover this work.

The Board, upon motion of petitioner, permitted petitioner to file an amended petition, with the understanding that all the material allegations thereof were to be considered as denied by respondent.

The parties also stipulated that the Board might take judicial notice of the ordinances of the City of Los Angeles, under which the condemnation proceeding in question was instituted, and of any part of this proceeding, that is, the complaint and the judgment or award or any part of the official records of this condemnation proceeding; that any parts of the ordinances and/or the condemnation proceeding in question as set out in the briefs of the parties could be considered in evidence in the case.

In addition, L. H. Wolf, the petitioner, testified as follows (R. 40–41):

> My name is L. H. Wolf. I am the petitioner in this case.
>
> I own the property in Hollywood, California, described as Lot A, Tract 2129, Map Book 24, Page 68. I acquired the property in 1920, and made improvements thereon, totaling approximately $75,000, subsequently.

The lower floor of the building in the front of the lot was occupied by stores, the second story by a hotel; the buildings in the rear were occupied by an automobile repair shop, a nickel-plating works, a laundry-loading station, and a storage room.

The portion of my property affected by the opening of Ivar Avenue was, both before and after such opening, in a light manufacturing district. The community has not been improved or built up since the opening of Ivar Avenue.

I did not vote or petition for the creation of the special assessment district which was the basis for the opening of Ivar Avenue through my property.

Exhibits 5, 6, and 7, consisting of certain maps received in evidence before the Board, were transmitted to this Court upon motion of petitioner (R. 42–44).

The Commissioner decided that the petitioner had realized taxable gain on the land taken and determined a deficiency of income taxes against petitioner for the calendar year 1929 in the amount of $1,249.44. The petitioner filed a petition for review and redetermination of the deficiency before the United States Board of Tax Appeals, and the Board affirmed the action of the Commissioner and determined the deficiency accordingly.

SUMMARY OF ARGUMENT

It is clear that petitioner disposed of 20% of a parcel of land and was awarded a sum greater than

the cost of the entire tract. This profit satisfies the accepted definition of income, but petitioner contends that it is not taxable because it was used to satisfy assessments against the remainder of the tract which he retained. These assessments were separate and distinct matters from the awards; they were not a charge against the portion disposed of, but against the portion retained. The incidence of the tax depends upon the receipt of income, and the result cannot be varied by the use to which the income is put. The awards to petitioner were of money. Petitioner was not required to use them to satisfy the assessments. He was free to use them for any purpose, and his election to set them off against the assessments does not avoid the tax.

Nor is the special statutory relief available to petitioner. Petitioner acquired nothing which would answer to the statutory definition of "other property similar or related in service or use to the property so converted."

ARGUMENT

Petitioner acquired a parcel of land at a cost of $21,000 and disposed of a strip representing 20% of its total area, receiving therefor $23,549. It is obvious that this transaction resulted in a profit to petitioner, and it is clear that it falls within the accepted definition of income which includes a profit gained through the sale or conversion of capital assets, *Eisner* v. *Macomber,* 252 U. S. 189, 207. Nor does it matter that petitioner's

profit was derived from a transaction in which the city condemned and took his property. There can be no denial that a condemnation award is income to the extent that it exceeds cost, *Patrick McGuirl* v. *Commissioner* (C. C. A. 2nd), decided January 7, 1935, reported in 353 C. C. H. par. 9055. That the petitioner has disposed of only a part of a large tract does not prevent the transaction from being a taxable disposition, *Searles Real Estate Trust* v. *Commissioner,* 25 B. T. A. 1115.

However, petitioner contends that the transaction here involved requires that these principles be disregarded due to the fact that the city which condemned the property made assessments against petitioner for street opening and widening amounting to $38,713.60, which petitioner paid by applying the total awards, amounting to $37,822, against the assessments, and paying the difference of $891.60 in cash. These assessments of course were not a charge against the portion of petitioner's property which the city condemned, but against the portion which the petitioner retained. What is here involved is petitioner's profit upon the portion of its property disposed of. That it used that profit to satisfy a claim against its remaining property is of no importance. Income taxes are not varied by reason of the use which is made of the income. Assume a manufacturer who buys raw material from and sells finished products to the same customer. His profits on the sales are a part of his income, whether or not he uses them to pay

for his raw material. Nor would the result be any different in a case where his bills for raw material equaled what was due him from the sales of the finished products, so that in fact no money passed from one to the other, but the accounts were balanced and mutually satisfied.

The award for the condemnation was a separate matter from the assessments for the improvements. If petitioner's entire parcel of land had been condemned there would have been an award and no assessment. If petitioner's parcel had been within the improvement district but not condemned, there would have been an assessment and no award. The maps in evidence show that the improvement district was very extensive and the number of property owners who received awards was necessarily very small as compared with the number who were required to pay assessments.

Petitioner had the right to collect his awards in full and pay the special assessments over a period of years. Section 12 of the Street Opening Act of 1903, as amended by California Statutes (1909), ch. 684, pp. 1035, 1040; Section 3, Statutes of California (1911), Appendix, *infra,* p. 24. The award was of money but petitioner had the option of paying the assessments by offsetting the awards against them. Section 21, Street Opening Act of 1903, California Statutes (1903), Appendix, *infra,* p. 20. Petitioner availed himself of this option (R. 32), but was required to deliver receipts for

the amounts due him. Section 21, *supra.* Accordingly, in contemplation of law petitioner received the awards in cash.

Petitioner contends (Br. 13–14) that the result here is the same as though he had built the street himself and dedicated it to the public. There would, of course, be no income involved in such a situation, but the difference between a gift or investment and a disposition at a profit is so obvious that this illustration shows that petitioner is proceeding upon a fallacious assumption.

Petitioner's attempt to merge the awards and assessments into a single transaction is equally futile. That the awards and assessments were for two distinct purposes, were arrived at by different methods, and were two distinct things, is evident from a perusal of the pertinent statutes. Sections 2, 5, 6, 8, 10, 12, 16, 19, 20, 21, 22, 30, and 31, Street Opening Act of 1903, California Statutes (1903), c. CCLXVIII, p. 376.

The sentence in Section 10, Second, of the Street Opening Act of 1903, as amended by California Statutes (1925), c. 104, p. 242, Appendix, *infra,* p. 20, reading "Such damages must be fixed irrespective of any benefit from such improvement" is significant. That was undoubtedly said to make it clear that, as to the land not taken, the owner, although he was to receive some benefit from the land assessed for which he would have to pay, was, in addition, to be entitled to severance damages.

If such damages were to be received irrespective of any benefit, surely he was to receive the value of the land taken irrespective of any benefit. The importance, from the taxing point of view, of the separation of the awards into (1) value of the land taken, and (2) damages to the land not taken, is that it fixes the exact amount of the gain realized from the disposition of the land taken, and the Commissioner of Internal Revenue used that amount in determining the gain and did not include any part of the severance damages in income.

The word "may" in Section 21, providing for the off-set, is very significant on the question of separability of the awards and the assessments. It means that the petitioner had an option to pay the assessments with the awards. He was not obliged to do so. The statute, in this respect, is different from the statutes in many States which allow the condemning authority to make the off-set and pay the difference, if any, to the owner, who is therefore granted no option in the matter. Of such a nature was the statute in *Carrano* v. *Commissioner*, 70 F. (2d) 319 (C. C. A. 2nd), relied upon by the petitioner, which case is also not in point because there was no separation of the awards for value of land taken and for severance damages to the land not taken.

The petitioner here could have done what he pleased with the money which he received from the awards, and under Section 31 of the Street Opening Act, California Statutes (1903), c.

CCLXVIII, he might have received it even before his assessments became delinquent. As for payments of the assessments, he could have permitted them to go to bond and paid them in installments, California Statutes (1911), Sec. 3, c. 630, p. 1192, Appendix, *infra,* p. 24.

When the petitioner off-set the awards against the assessments he did not pay his own awards, as he says in his brief (p. 17), but used the amounts to which he was entitled from the awards to pay the cost of improvements to his other property, from which he would receive the benefit. A payment for assessment benefits he was expressly prohibited from deducting from income by Section 23 (c) (3), Revenue Act of 1928 (Appendix, *infra,* p. 17), and, if his contentions are sustained, it would, in effect, be allowing him such a deduction, although other taxpayers, such as those who received no awards (of whom there were many more than those who received awards) would not be allowed similar deductions, which would be unfair and unequal, and, therefore, it is to be presumed, not intended. The petitioner can, however, add the payment which he makes for assessments to the cost of the property retained and upon sale thereof his gain will be reduced by the amount of such payment, *Champion Coated Paper Co.* v. *Commissioner,* 10 B. T. A. 433, 445–447; *F. M. Hubbell Son & Co.* v. *Commissioner,* 19 B. T. A. 612, 615, affirmed, 51 F. (2d) 644 (C. C. A. 8th), certiorari denied, 284 U. S. 664; I. T. 2599, X–2 Cumulative Bulletin 170.

The awards and the assessments were separate transactions, even though they may have been provided for by the same statute. It is only a fortuitous circumstance that petitioner, unlike many others, was affected by both. This Court has held two bond transactions to be entirely separate despite the fact that the same money was involved in both. *San Joaquin Light & Power Corp.* v. *McLaughlin,* 65 F. (2d) 677. See also *Helvering* v. *The California-Oregon Power Co.,* decided January 7, 1935, reported in 353 C. C. H., par. 9054.

In regard to the petitioner's contention that if taxable income should be held by this Court to have been realized on the sale of the lot condemned, $7,742.72, or 20% of the assessment, should be added to the cost of the lot condemned, it need only be said that under Section 16 of the Street Opening Act of 1903, Appendix, *infra,* pp. 22–23, the assessments were not laid on the lot condemned and no part of them should, therefore, be added to its cost.

Petitioner's final contention is that the profit was nontaxable under Section 112 (f), Revenue Act of 1928, Appendix, *infra,* p. 18, because it was "expended in the acquisition of other property similar or related in service or use to the property" taken by condemnation. It is clear from the construction of the statute that this is a departure from the general rule, and hence petitioner is in the position of one claiming exceptional treatment. Such statutes are not to be construed liberally, as contended

by petitioner. On the contrary, they are strictly construed against the exemption, and one claiming the application of such statutes has the heavy burden of showing that he is within the class intended to be benefited, *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 187.

Petitioner contends that, because he exercised the option granted to him by Section 21 of the Street Opening Act of 1903, Appendix *infra*, pp. 23–24, of offsetting the assessments upon his property not taken against the awards to him for his property taken, and with the addition by him to the awards of $891.60 in cash, thus paying the assessments, he thereby expended the money forthwith in good faith under regulations prescribed by the Commissioner with the approval of the Secretary in the acquisition of other property similar or related in service or use to the property so converted. The petitioner's contention on this point seems to be that he thereby acquired some property right in the new street. This contention, as the Board in its opinion said (R. 19), is "highly artificial." But assuming, without admitting, that he did acquire some property right in the new street, the further contention made by him that this property right acquired is similar or related in service or use to the property condemned is without foundation in fact. The property condemned was the fee in that

property with improvements thereon which had been devoted by him to business purposes. Assuming that he, as an abutting owner, acquired a special easement in the street, additional to any rights which he, as one of the public, might have in the street, that easement is not the fee, which fee had been dedicated to the city (see Section 12, as amended by Cal. Stats. 1909, c. 684, pp. 1035, 1040), and he could not use it as he could have used the property condemned. The money received by him was, therefore, not used as the taxing statute provided, if gain is not to be recognized. The gain should therefore be recognized.[1]

CONCLUSION

The decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
EDWARD H. HAMMOND,
Special Assistants to the Attorney General.

JANUARY 1935.

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[1] A good example of the kind of property similar or related in service or use to the property converted intended by the statute is that acquired with the money received from the award in the condemnation proceedings mentioned in the case of *Bliss* v. *Commissioner*, 27 B. T. A. 803.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(e) *Determination of gain or loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally.*—Taxes paid or accrued within the taxable year, except—

* * * * *

(3) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall not exclude the allowance as a deduction of

so much of such taxes as is properly allocatable to maintenance or interest charges.

* * * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

(f) *Involuntary conversions.*—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of

the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 571. *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the amount of gain or loss determined under section 111 shall be recognized, is governed by the provisions of section 112. Section 112 provides that the entire amount of the gain or loss upon any sale or exchange of property shall be recognized, with specified exceptions therein set forth, which are discussed in articles 572–580. Unless the sale or exchange falls within the provisions

of these articles the entire amount of the gain or loss thereon must be calculated and reported.

ART. 579. *Involuntary conversion of property.*—Section 112 (f) deals with cases in which property is compulsorily or involuntarily converted into similar property, or into money, as a result of fire, shipwreck, theft, condemnation, or similar causes enumerated in the Act. If the property so destroyed, stolen, seized, or condemned is replaced in kind by similar property or property related in service or use, no gain or loss is recognized. If, however, the original property is compulsorily or involuntarily converted into money, gain or loss will be recognized unless the money is forthwith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended—

(1) In the acquisition of other property similar or related in service or use to the property so converted,

(2) In the acquisition of control of a corporation owning such other property, or

(3) In the establishment of a replacement fund.

If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended. See article 601 for the basis for determining gain or loss from the sale or other disposition of the property so acquired.

Street Opening Act of 1903, California Stat. 1903, c. CCLXVIII, pp. 376, 379:

SEC. 10. (As amended by Statutes of California, 1925, c. 104, p. 238, 242). For the purpose of assessing the compensation and damages, the right thereto shall be deemed to

have accrued at the date of the issuance of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act, *provided,* that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of trial.

If an order be made letting the plaintiff into immediate possession and the plaintiff shall take immediate possession upon commencing eminent domain proceedings and thereupon giving such security in the way of money deposits as the court may determine to be reasonably adequate to secure compensation to the owner, as provided in section fourteen of article one of the constitution, then the compensation and damages awarded shall draw interest at the rate of seven per cent per annum from the date of such order.

No improvements placed upon the property proposed to be taken, subsequent to the date of the publication of the notice of the passage of the ordinance of intention, or subsequent to the date of the filing of a notice of the pendency of an action brought for the condemnation of such property, shall be included in the assessment of compensation or damages.

The referees, or court, or jury, as the case may be, shall find separately:

First.—The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty,

and of each separate estate or interest therein;

Second.—If any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Such damages must be fixed irrespective of any benefit from such improvement.

SEC. 16. (As amended by Statutes of California, 1925, c. 104, p. 238, 243.) The city engineer shall deliver said diagram to the street superintendent and shall indorse thereon the date of such delivery. The street superintendent upon receiving the said diagram shall proceed to assess the total expenses of the proposed improvement (first deducting from such total expenses such percentage thereof or sum toward the expense of said improvement, if any, as the city council may have declared by the ordinance of intention that the city shall pay) upon and against the lands, including the property of any railroad or street railroad, within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; *provided,* however, that the city council may by order extend the time for completing said assessment for a period not exceeding ninety days additional. The total expenses of the improvements so to be assessed shall include the amounts awarded

to the defendants by the interlocutory judgment in the action for condemnation, together with their costs, the compensation and expenses of the referees, as allowed by the court, and all other costs of the plaintiff in such action, the expenses of making the assessment, and all expenses necessarily incurred by said city, in connection with the proposed improvement for the publication of ordinances, posting and publication of notices, for maps, diagrams, plans, surveys, searches and certificates of title to the property to be taken, and all other matters incident thereto.

* * * * *

SEC. 21. The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for non-payment thereof, as hereinafter provided, demand of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked "paid by offset"; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money, and the assessments shall, on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money. In either case, as a condition of the offset, such person must execute to the city and deliver to the street superintendent dup-

licate receipts for such part of the amount due him under said interloctuory judgment as is offset against such assessments, penalties, and costs. One of said duplicate receipts shall be filed by the street superintendent in his office, the other shall be filed with the clerk of the superior court, and on such filing, the city shall be entitled to a satisfaction pro tanto of said interlocutory judgment.

Statutes of California, 1911, c. 630, p. 1192:

SEC. 3. Whenever it is determined as provided in section 2 hereof that improvement bonds may be issued to represent assessments, the owner of any lot or parcel of land against which an assessment has been made, when the amount of such assessment is fifty ($50) dollars or over, may at any time prior to delinquency, elect to pay such assessment in installments and to have an improvement bond issued against such lot, in the form and manner and with the effect in this act provided; *provided,* there be no other bond or bonds outstanding against said lot representing any special assessment.

U. S. GOVERNMENT PRINTING OFFICE: 1933

No. 7504.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. H. Wolf,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT.

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SCOPE OF THIS BRIEF.

This brief does not propose to cover all the grounds upon which the judgment should be for the appellant, nor to duplicate appellant's brief, but by further reasons, and by additional facts (presumed by the oral stipulation of the parties [R. 39, 40] to be in the record, and specially set forth herein), to make even more evident that no "gain" was "derived" by petitioner from said award or street proceeding; and, by another view of the application of

Section 112(f) of the Revenue Act of 1928, to show that any apparent gain should not be recognized, but that the payment of the assessment on the two remainders (to be left after the part condemned was taken) should be treated as a "reinvestment" in other property similar or related in service or use to the property condemned.

ARGUMENT.

Petitioner derived no gain from the award because:

I.

Under the 1903 Street Act and the conduct of this street proceeding thereunder the assessment must be treated at the present time as an expense inseparably connected with the award, and the award cannot be considered as a closed transaction separated from the assessment, but the whole proceeding, including the assessment as well as the award, must be treated as one transaction, and only the net result of the whole proceeding should be considered in determining whether or not gain in the constitutional sense has been derived; and,

II.

Petitioner exercised his legal right to offset the award against the assessment and therefore in fact as well as in contemplation of the income tax amendment he actually received no gain; and,

III.

The provision of Section 23(c)(3) of the Revenue Act of 1928, asserted to require deferring deduction of the assessment until the remainder is sold, have no application and do not control the assessment here made to pay the award; and,

IV.

If any profit may be deemed to have been realized on this award, then the payment of the assessment upon the remainder by offsetting the award amounts to an acquisition of a paramount title and interest in the remainder, and the remainder being a part and parcel of the same land from which the part condemned was taken, the two (the part taken and the remainder), are obviously not only similar or related in service or use, but are identical in service and use, and therefore within the provisions of Section 112(f) of the Revenue Act of 1928 which prescribe that gain under those circumstances shall not be recognized.

STATEMENT.

For brevity, and to avoid unnecessary repetition, respondent's statement of facts, as set forth in respondent's brief, pages 2-7, inclusive, are hereby incorporated herein by reference. Hence, we give here only a brief picture, a resumé of the main facts. Others will be adverted to in argument. The main facts follow:

A street proceeding was conducted by the City of Los Angeles under and in conformity with the Street Opening Act of 1903, and a 70-foot strip through the center of petitioner's parcel of land was taken pursuant thereto. Said street proceeding required that virtually the entire cost of the acquirng of the lands for the street be assessed against the lands described in the Assessment District. Petitioner was awarded $23,549.00 for land taken, exclusive of severance and damage to buildings. He was assessed $38,713.60 upon the remainder of said property to pay for the cost of acquiring the land. He availed himself of the provisions of the Street Act, giv-

ing him the option to require the said award of $23,549.00 (plus other award for severance and building damage), to be applied upon said assessment of $38,713.60, and it was so offset. [Stipulation of Facts, R. 30-33.]

Additional facts as shown by the official records in connection with said condemnation proceeding and the matters connected therewith as certified to by the Bureau of Assessments of the City of Los Angeles, are set forth in the appendix hereto [pp. 1-18], and made a part hereof by reference.

(The original of said certified statement of facts of said Bureau of Assessments has been filed with the clerk of this court.)

The outstanding and significant facts of this certificate are:

The street proceeding was a terribly expensive one—right through the heart of Hollywood, California. Cost, $4,162,000. [App. p. 3, par. 2.]

It was just for acquiring land; no paving or other work was done thereby. [App. p. 2, par. 4.]

The assessment district paid virtually the whole bill—97% thereof; the City of Los Angeles, 3%. [App. p. 3, par. 2.]

That the assessment in nowise represents or was meant to represent supposed benefits, but solely the proportion of the total cost of the street proceeding which had to be borne by petitioner. [App. p. 3, last par., to p. 4, incl.]

That it was recognized at the time of making the assesment that the said assessment on petitioner was in excess of any supposed benefits to each and all of the parcels assessed. [App. p. 6, 4th par., to p. 7, 1st two pars., incl.]

That assessments were levied of $25.00 to $75.00 per front foot on purely residential property where no foreseeable benefit could result from being put on a widened heavy traffic artery, but only detriment could occur from this proceeding [App. p. 7, pars. 3-4]; also Schedule 3 [App. pp. 17-18].

That the major bases of expected benefits, to-wit: a continuance of the prosperous conditons of the Spring of 1929 [App. p. 5] and the development of Ivar avenue into a high-class business district [App. p. 5] were false assumptions which have not materialzed, as the community has remained light manufacturing. [Tr. 41.]

QUESTIONS PRESENTED.

Under these main circumstances the following specific questions arise:

1. Did the petitioner realize any taxable gain from the street proceeding?

2. Can this street proceeding, under these circumstances, be divided up into separate parts and the award be called one transaction, and the assessment another transaction; or is the award so dependent upon, and connected with, the assessment that the assessment is really a cost incident to getting the award, and to be so treated in determining whether petitioner derived any "gain."

3. Should Section 23(c)(3) be extended to the situation disclosed by the above facts so as to enable the Treasury to assume a fictitious gain on this award where none was in fact derived, and impose a tax on such assumption.

4. If an apparent profit was realized from this street proceeding, then was the payment of the assessment upon the remainder, by offsetting the award, such an acquisition of title to or interest in other property similar or related in service or use to the said part taken as justifies the application of the nonrecognizing provisions of Section 112(f) of the Revenue Act of 1928?

PREFACE TO ARGUMENT.

There is no question but that said assessment can be taken into consideration and deducted as a cost by the petitioner. The only question is whether the petitioner may take it into consideration *now* in connection with his award by reason of his having offset the award against the assessment, and by reason of the real nature of the assessment as primarily and chiefly *an expense incident to getting the award;* or must he wait until he sells the remainder? The United States Circuit Court of Appeals for the Second Circuit in two cases identical in facts and issues with the present one, held that this was the real question at issue, in the following language:

> "The question is only as to when the expenditure is to be brought into the reckoning, and could not arise if the original 'basis' were greater than the award. The taxpayer would then have nothing to pay, and the assessment would remain to swell whatever was left of the original 'basis,' when the property was sold."

Carrano v. Commissioner of Internal Revenue, 70 Fed. 2d, 319, 320 (and *Neville v. Commissioner,* companion case decided by stipulation of the parties and the order of the court to abide the event of the *Carrano* case).

ARGUMENT.

I.

Petitioner Derived No Gain From the Award Because Under the 1903 Street Act, and the Conduct of This Street Proceeding Thereunder, the Assessment Must Be Treated at the Present Time as an Expense Inseparably Connected With the Award, and the Award Cannot Be Considered as a Closed Transaction Separated From the Assessment; but the Whole Proceeding, Including the Assessment as Well as the Award, Must Be Treated as One Transaction; and Only the Net Result of the Whole Proceeding Should Be Considered in Determining Whether or Not Gain in the Constitutional Sense Has Been Derived.

It was stipulated, and the complaint condemning the parcels taken shows, that the whole of the said street proceeding was taken pursuant to and in conformity with the Street Opening Act of 1903.

(1) *The Street Opening Act of 1903, as interpreted and applied in practise, makes the assessment represent a proportionate part of the cost of the street proceeding irrespective of whether any supposed benefits are one-quarter or one-tenth of the assessment, and even where the supposed benefits are negligible or nonexistent; for said bureau's report certifies:*

> "That the assessments levied on the various parcels in said proceeding were determined, fixed and levied by said Bureau of Assessments, pursuant to the provisions of Section 16 of the Street Opening Act of 1903. Said Section 16 provides that the 'Superintendent of Streets (in this particular case the Bureau of Assessments) shall proceed to assess the total ex-

pense of the total improvement (less any allocation made by the City of Los Angeles) upon and against the lands, . . . *in proportion* to the benefits to be derived from said improvement. That the Bureau of Assessments has construed said section to mean that the expense shall be distributed *in proportion* to the respective benefits which it estimates the respective lots in the Assessment District receive from the improvement *without regard to the actual benefit* (except insofar as the actual benefit forms the basis upon which to fix the assessment by mathematical proportion)." [App. pp. 3, 4.]

The Bureau assessed petitioners said property without regard, except remotely, to any supposed benefit!

". . . the Bureau . . . in levying the assessment on the parcels assessed in said street proceeding (including those on Ivar avenue) did not determine or fix any of the amounts so assessed upon the theory or basis that the amount so assessed, either collectively or individually, represented what in its opinion was the amount of benefit which it estimated would accrue to the parcels assessed, but rather to the contrary the amounts so assessed were in excess of any possible benefit it could foresee likely to accrue to said parcels, either collectively or individually. . . .

"In other words, under this section an actual assessment may be one-half the estimated benefit, or it may be three, five or ten times the estimated benefit. The function and practice of this Bureau in connection with this project was not to determine and provide in said assessment that the amount assessed was equal to the actual benefit estimated, but merely to arrange an assessment so that the expense of said proceeding (as finally fixed by the court, plus the

expenses) was proportionately divided among the respective parcels according to the respective benefits, which by reason of the facts it was estimated would be enjoyed by the various parcels from said proceeding. In other words, if Parcel 152 were determined by the Bureau to have an estimated actual benefit of $200 from said proceeding and other parcels were estimated variously to have actual benefits of various sums which were fixed, and the total amount of estimated actual benefits accruing to these various parcels in the assessment district equal the sum of $1,040,000, this sum being roughly one-fourth of the $4,162,140.25 which had to be raised in said street proceeding, each parcel would have to bear an assessment of four times the estimated benefit." [App. p. 4.]

The law thus applied results thus: A street opening proceeding costs $100,000.00. The prescribed assessment district contains 5 parcels, which are estimated will receive from the opening the following benefits: Parcel (#1), $2000.00; parcel (#2), $3000.00; parcel (#3), $4000.00; parcel (#4), $5000.00; parcel (#5), $6000.00, making a total of $20,000.00 estimated, supposed benefits to all parcels in the assessment district. But this $20,000.00 estimated benefits is only 1/5th of total cost required to be raised. So to raise that amount, the assessment on each lot is stepped up 5 times, so that parcel #1 now is assessed 5 x $2000.00 estimated benefits or $10,000.00; parcel #2, 5 x $3000.00 estimated benefits or $15,000.00 and so on each amount is multiplied 5 times to reach the total cost. This is shown clearly by the following language from said report:

"Though the final amounts levied against the individual parcels, while in excess of the actual benefit to

accrue, nevertheless had to be placed against these parcels in order that they would total the grand total cost of the proposed improvement, less said allocation. In other words, the actual benefit assessment had to be stepped up proportionately and mathematically so that the total of the assessment so increased equaled the total cost which had to be raised by the assessment." [App. p. 7.]

(2) *Hence the said assessment as levied on said remainder of petitioner's property, as well as the other lands in the assessment district represents nothing but a proportionate cost of the said proceeding.*

The said Bureau of Assessment admits that the assessment on every parcel in the assessment district was in excess of any supposed benefits. We quote from the report:

"In levying the assessment . . . it was the opinion of the Bureau . . . that the amount actually assessed . . . including all those fronting on Ivar avenue, not only collectively exceeded the collective estimated actual benefit to accrue to those parcels from the street proceeding, but that in each individual case the assessment levied against the individual parcel was in excess of the actual benefit estimated to accrue to that parcel in said proceeding." [App. pp. 6, 7.]

Said report shows that assessments were levied in this proceeding, even though it was obvious to the Bureau that no appreciable benefit could result therefrom, nevertheless an assessment was made on the remainder.

The said report shows, in relation to the widening on Cahuenga, between Highland avenue and Dix street, that

the frontage was substantially residential property, which from common knowledge is injured by having a street widened and a race track of heavy traffic made of the street, which increases the hazards for children and pedestrians, makes their homes less attractive, which with the volume of noise, smoke and vibration accompanying a large volume of traffic unquestionably decreases the value of residence property. That nevertheless assessments of $25.00 to $75.00 per front foot was levied on this residential property. [App. p. 7, par. 3.]

> "That it was recognized that it was unlikely that there would be any appreciable change in the residential character of the improvements put upon said respective parcels on Cahuenga avenue between said streets, despite said widening of Cahuenga avenue by this proceeding, at least for a long time forward, for various reasons. . . ." [App. p. 7.]

The "Bureau" in levying the assessment on petitioner's said property, as well as on the other parcels in the same block with petitioner, anticipated that this block would by reason of this street proceding develop into a high class business section. We quote:

> ". . . and, particularly, in levying the assessment of Ivar avenue *it was anticipated* that Ivar avenue below Hollywood boulevard and down to Sunset boulevard, *would develop into a high-class business district.*" [App. p. 5.]

But it did not so develop!

The evidence, particularly the testimony of the petitioner, which was uncontradicted, shows to the contrary that no change in the character of the community surrounding his said property had occurred since said pro-

ceeding, and that it was then, and still is, a light manufacturing district. [R. 40-41.]

The said report further shows that the general economic basis, upon which the estimated benefits were predicated, turned out to be unsound.

First: The benefits were based upon the assumption of the continuance of the general conditions of prosperity prevailing in the Spring of 1929, which it now is common knowledge, is an unsound assumption, as these prosperous conditions have not continued in Hollywood or anywhere. These facts are shown by the Bureau's report, which states:

> "In estimating actual benefit believed by the Bureau likely to accrue to the respective parcels in the assessment district as a result of said street proceeding, and as a basis for fixing said proportionate assessment, many factors were considered and a long range view over a long period of time made of prospective benefits. Current general as well as local economic conditions existing in 1929 were among the factors considered by the Bureau in estimating said benefits and in fixing said respective assessments. General economic conditions were at high peak. Said benefits so estimated to accrue to said respective parcels from said proceeding were predicated to a large extent upon a substantial continuance of the prosperous conditions prevailing in the Spring of 1929." [App. p. 5.]

Second: One of the major bases of estimating the benefits to accrue to said Ivar avenue land owners (which includes petitioner) by reason of said proceeding was that Cahuenga avenue and the other streets leading into Cahuenga avenue, and forming the Five Finger Plan (with Cahuenga avenue forming the wrist of the hand and

Ivar avenue and other streets forming the fingers), would continue indefinitely to be the major artery for handling the traffic coming through the Cahuenga Pass from San Fernando Valley and going towards Hollywood and Los Angeles. The Bureau did not anticipate the prospective development of Highland avenue (another and perhaps more important and potential artery for sharing in the traffic coming down Cahuenga Pass from the San Fernando Valley), especially with the use of a large amount of state funds, into a secondary state highway.

Thus putting Highland avenue landowners in a better financial condition to develop a nearby competitive business district, which would substantially detract from the assumed development of Ivar avenue into a high class business district.

> "These factors were not considered at the time of levying the assessment on Ivar avenue and the aforesaid development of Highland avenue was in the formative stage, and there was no indication at that time that Highland avenue would be developed and widened, the state of California bearing one-third of the cost of acquiring the land for widening and paying all of the cost of paving with the resulting benefits to Highland avenue as a competitive business street." [App. p. 6.]

It is, therefore, evident from these facts that the major factors upon which the actual benefits were estimated turned out, by subsequent developments, to be unsound, so that even the actual benefits as supposed were, and now still are very uncertain, speculative and conjectural, and, in fact, may never be realized to any degree.

In conclusion on this point, it is obvious that with the actual benefits supposed to accrue, based upon faulty prem-

ises and the admission by the Bureau of Assessments that the actual benefits had to be stepped up to meet the cost of the proceeding, the whole of the assessment represents, at the present time at least, an expense and liability which was necessarily fastened upon the petitioner and others who received awards to pay for those awards, and hence a cost incident to getting the award.

Petitioner not only paid by way of assessment expense a sum equal to the award for the land taken, which is here construed by the respondent as a sale, but an amount actually more than twice the amount of his award for the land taken (after deducting the prorated cost of the previous investment, but ignoring the assessment).

The stipulation of facts [R. 30-33] shows that for the land itself (exclusive of severance damage and damage to building) petitioner received $23,549.00. That the prorated cost of the 20% of the whole was $4,200.00. He paid $1,000.00 attorneys' fees, which left him for the land taken $18,349.00, and his assessment expense was $38.713.60. Unless he paid that expense he would lose the remainder by sale under Sections 22 and 23 of the Street Opening Act of 1903. (App. Br. pp. 31, 32.) Under these circumstances, the assessment must be treated as an expense; or, as pointed out by appellant's brief the award and the assessment must be treated as part of *a transaction that is not yet closed, and which cannot be closed* until enough of the remainder is sold to equal the cost or basis, including said assessment of $38,713.60. *Common sense, which is more reliable than astute reasoning upon technicalities, must make it plain that no profit or gain was actually received by petitioner from said street proceeding,* and that the assessment must be taken into consideration in connection with the award.

Petitioner was not the only one who paid his own award. Schedule 1 of said report affords a comparison of the awards received for the opening and widening of Ivar street in this proceeding and the assessments levied upon the remainder. [App. pp. 9-12.] It shows that Ivar street land owners in the block in which petitioner's land was located, to-wit: between Selma avenue and Sunset boulevard, received for the land taken $217,209.00 and paid by way of assessment upon the remainder $188,044.41; in other words, they paid, roughly, 86% of the amount received by them as awards for the land taken. [App. p. 8, pars. 4-5; p. 10.]

These facts go to show that, substantially, those receiving awards paid back most of what they got by way of assessment, which, as we have pointed out above, was without question an expense for a public proceeding and not by way of a benefit. Respondent argues in his brief (p. 13, lines 17-20), that those receiving awards who paid assessments were smaller in number than those who paid assessments and received no awards, but he failed to point out, as shown by the report of said Bureau, that while their number was smaller, they paid the far greater cost of this proceeding. [App. p. 3, par. 3.]

Said report also shows that it is not true that it was

> "a fortuitous circumstance that petitioner unlike many others was affected by both"

the award and the assessment, as claimed by respondent (Resp. Br. p. 14, lines 3-5), and upon which untruth respondent bases his argument that the award and assessment were separate transactions. For as a matter of fact, as shown by said report, all of the persons who belonged to the class with petitioner, *i. e.,* who received awards,

were assessed upon their remainders to pay for the awards. And there were 372 of this class who were so assessed. This is hardly an accident, a fortuitous circumstance, but the logical carrying out of the street proceeding under said Street Act of 1903 in apportioning the cost thereof over the assessment district which took in 372 persons in this proceeding who were identically situated with petitioner. There were 372 parcels of land, part of which was condemned and the balance of which was assessed to pay for the cost of acquiring the land. [See report, App. p. 3.] This is also borne out by Schedules 1 and 2 of said report, which show the amount of the award and the amount of the assessment levied against the remainder of the property belonging to said persons receiving awards. [App. pp. 9 to 16.]

Other provisions of 1903 Street Act, and this street proceeding strongly suggest that the award and assessment should not be considered as separate transactions:

(1) The award and the assessment depend upon, and are in pursuance of, the declarations of the Ordinance of Intention, notice and hearing thereon. Secs. 2, 3 and 4 [App. pp. 19-20.]

(2) The said Ordinance of Intention describes both the lands to be condemned and the assessment district, as required by Sec. 2 of said Act. (Complaint, pp. 21, 194.)

(3) A defect in the jurisdictional steps of the Ordinance of Intention and the hearing thereon are fatal to both condemnation proceeding and the assessment. Sec. 2 [App. p. 19.]

(4) The condemnation complaint must incorporate by reference the Ordinance of Intention with

a description of the assessment district. Sec. 7 [App. p. 21.]

(5) Should the assessment be set aside the condemnation proceeding must fail, for, as pointed out, Section 16 provides the only method for paying the awards; and in this proceeding only about 3% was available other than by assessment.

(6) Section 14 provides that even after the assessments have been levied and collected the city may abandon the whole proceeding irrespective of the entry of interlocutory judgment of condemnation. [App. p. 21.]

(7) Section 31 provides that the judgment does not become final nor the easement title to the land condemned vested in the city until *after the assessments have been levied and collected* and the money therefrom used to pay the awards and thereafter, upon proof of the payment of the awards, final judgment may be entered. (App. Br. p. 32.)

(8) The plan and scheme set up by the Act for determining benefits and levying assessments, is too loose, too informal and unscientific to warrant the conclusion that it was meant to be a genuine ascertainment in each case that the benefit truly equaled the assessment made on a particular parcel, for the plan and procedure shows merely a general procedure sufficient to support, from a constitutional standpoint, the levying of the assessment.

(9) Without some such orderly procedure, such as we have in condemnation cases giving the basis for the appraisal of damage, it is obviously impossible for the City Council to determine in each case whether the assessment is equaled by the supposed benefits. In fact no such attempt is ever made in practice.

The Council hears the protests against the assessment *en masse,* and unless there is some great outstanding discrepancy relatively between the assessment objected to and other assessments, the assessment is confirmed. The Council does not go into the question of how much increase in income or in value would actually accrue to a parcel assessed and into the *minutiae* of the basis for it.

(10) Furthermore, no practicable appeal to the courts is available, for, by Section 19 of the Act the approval by the City Council of the assessment is final and conclusive in the absence of fraud, or conduct on the part of the City Council amounting to fraud. [App. p. 22.]

Further, the whole of said Act read together exhibits clearly a single scheme and plan of acquiring land for "public interest or convenience" (Section 1 of said Act), [App. p. 20] and the paying of the cost thereof by levying the same on the assessment district, except insofar as good fortune, good politics and the financial condition of the city enables the assessment district to get the public to bear part of this street opening or widening; in this case it was very poor for only 3% was contributed by the city on a four million dollar project for public interest and convenience,—almost confiscation—and now the respondent would tax them on top of it on the basis of some supposed gain. After the payment of the burden of this street widening this is almost "insult upon injury," and certainly an attempt at a great moral wrong without justification in the facts, and an attempt which should no more be encouraged here against California citizens than it was in Hartford, Connecticut where the Second Circuit Court of Appeals refused to be a party to such a

proceeding in a situation far less grevious than the one before this court.

(4) The fourth point under our Proposition I is *that the award,* because of said language of said Street Act and said street proceeding thereunder, *cannot be considered as a closed transaction separated from the assessment.* Inasmuch as appellant in his brief has discussed at length cases showing various circumstances wherein the court held the transaction could not be considered a closed one, and pointed out in his brief some of the facts which go to show that this award cannot be considered a closed transaction separated from the assessment, it is not necessary to review here said cases or the facts regarding this not being a closed transaction, but merely to point out that many additional facts are called to the attention of the court by this brief which go to show why the award cannot be considered a closed transaction independently of the assessment. These facts include all the matters heretofore discussed, the interpretation and application of the language of said Section 16 to this street proceeding and to petitioner's remainder by the said Bureau of Assessments in levying an assessment upon said remainder, known by them to be in excess of any supposed benefit; the fact that the assessment was based upon unsound factors and the detail of the other provisions of said Street Act which indicate that the whole of said street proceeding thereunder must logically be viewed as one proceeding. All of these facts, and others, are pertinent to the question of whether the award can now be considered a closed transaction independently of the assessment.

(5) Our fifth point involved in proposition I is the question of whether under the peculiar circumstances

of this street proceeding, its language and conduct, the manner in which the assessment was levied and the basis upon which it was made up, there was any gain, at the present time, in the constitutional sense.

"Income" has been defined by the Supreme Court as "gain." (*Eisner v. Macomber,* 252 U. S. 182, 207, 64 L. Ed. 521.)

It is evident there was no gain from the street proceeding. Petitioner lost thereby. For land taken he received $23,000.00, less cost and attorney's fees. He paid $38,-713.60 assessment. How did he "gain"?

Further, the "Bureau's" report shows clearly the assessment was a proportionate expense to pay the award. Hence petitoner's said assessment must be treated now as an expense forced on the land owner to enable the City to pay the awards, and thus the basis of the remainder reduced for future computation of profit on the sale of the remainder, after petitoner has recouped his investment of $75,000.00 in buildings, plus the land and plus the assessments then levied, and since then levied, and any additional investment and less the award.

The Government has failed to bear the affirmative of the issue to show that the assessment was not an expense or liability incident to getting the award. This the respondent must do. The Circuit Court of Appeals in an identical case so held in the following language:

> "The Treasury, like any other party who has the affirmative, loses, when the answer is in balance. The doctrine applicable is somewhat akin to the canon of statutory construction which takes all doubts in the taxpayer's favor. Crooks v. Harrelson, 282 U. S. 55, 61, 51 S. Ct. 49, 75 L. Ed. 156."

The court saying further:

> "In this instance the 'gain' in dispute could arise only on the hypothesis that so much of the award as paid the assessment was received before the assessment itself was paid. This was demonstrably not the case; it was received at the same time. Thus it does not affirmatively appear to be a taxable 'gain' at all, and the taxpayer wins. Moreover, this is the direct and natural way to look at the transaction. The taxpayer has 'gained' only what he has received above his cost; so far as his award has been cancelled by the assessment, it is not a 'gain' at all, it is instantly absorbed by a new cost which arises and is paid without allowing him even a momentary possession of the 'gain.'" (Order reversed—deficiency expunged.)
>
> *Carrano v. Commissioner,* 70 Fed. (2d) 319 at p. 321, col. 1, lines 37 to end of page.

As indicated by the above quotation from the case of Carrano v. Commissioner, the Circuit Court of Appeals for the Second Circuit, flatly and squarely held in a case identical in the material facts with the one before this Court on this appeal that the assessment must be deducted from the award before computing any supposed gain.

A companion case, that of *Neville v. Commissioner,* consolidated at the trial before the Board of Tax Appeals was by stipulation and order of the court to abide the event of the *Carrano* case. [Record *Carrano* case filed herewith, pp. 66, 67.] In the two cases of *Carrano v. Commissioner* and *Neville v. Commissioner,* no appeal was taken from the decision against the respondent, and that decision has become final. It may, therefore, be fairly assumed that respondent admits the correctness of the

decision in the *Carrano* case upon the facts there. Those facts were, briefly, that Carrano and Neville both received awards for land taken. Carrano received damages to two parcels, of respectively, $40,304.12 and $38,364.92, and was assessed on the said parcels, respectively, $8,928.00 and $8,116.50. (Transcript of Record in the said *Carrano* case, p. 47.) Carrano on appeal contended that the assessments should be deducted from the said awards before computing any gain. (See said Transcript of Record, p. 37); also memorandum of opinion therein, page 44, second paragraph, where the Board of Tax Appeals says:

> "The issue in each proceeding, as stipulated by the parties, is whether certain benefits to property 'assessed by the City of Hartford should be deducted from the award of damages made by said city, in determining whether the petitioner received an amount in excess of the cost of the property and thereby realized a taxable gain from the condemnation of his real estate, or whether the gross amount only of the award made by the said city should be considered in determining whether or not a taxable gain was realized.'"

The facts in the *Neville* case were similar [R., *Carrano* case, 44, 45, 46, 47.] Upon those facts the Circuit Court of Appeals said assessments must be considered with the award and deducted therefrom.

(c) Despite the fact that the Government knew it had this case and other cases involving the same question of deducting the assessment levied on the remainder from the award before arriving at any "gain" or income, the Government was willing to abide by the reasoning and decision in the *Carrano* and *Neville* cases, without asking for re-

hearing or appeal to the Supreme Court. *This action may fairly be construed as an admission of the correctness of the decision and of the reasoning of the court in the Carrano case that when the assessment is paid by offsetting the award, only the balance, if any, can be used in determining "gain."*

(d) Respondent's attempts to distinguish the *Carrano* and *Neville* cases from this one on the two following grounds:

(1) Respondent says that in this case now before this court the petitioner had the option to offset or not to offset the award against the assessment, whereas in the *Carrano* and *Neville* cases he was obliged to offset award against assessment; hence he implies, in the *Carrano* case the taxpayer didn't get that part of the award offset against the assessment by direction of the Court of Common Counsel of the city of Harford. But respondent ignores two things in attempting to say Carrano shouldn't be treated as having gotten this part of the award offset against the assessment: First, that the Circuit Court of Appeals in deciding the *Carrano* case expressly held with the Commissioner and the Board of Tax Appeals that the whole award is to be considered as received by the taxpayer. The Circuit Court says (70 F. (2d) p. 321, col. 1, lines 3-14):

> "We are disposed to go along with the Board in holding that the whole award is to be considered as received by the taxpayer, that part of it not received in cash having been used to pay a lawful liability, the assessment." (Citing Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 729, 731; U. S. v. Boston and Maine R. R. Co., 279 U. S. 732; U. S. v. Mahoning Coal R. R. Co., 51 F. (2d) 208.)

The transcript and the briefs in the *Carrano* case filed herewith further show that the city charter provisions of the city of Hartford, under which the street proceeding was carried on and the award and assessment made, declare that the offset shall be deemed a payment. [Tr. p. 50, Resp. Br. pp. 67, 16.]

Furthermore, the respondent in the *Carrano* case in its brief expressly urged that the Board of Tax Appeals and the Circuit Court consider that Carrano and Neville had received payment of the amount of the award which was offset against the assessment, by the express order of the Court of Common Counsel, in accordance with said city charter provisions. (Pages 6, 7, 10, of Resp. Br. therein.)

And in accordance with the respondent's contention, the Circuit Court, as cited above, agreed with the respondent and the Board that the petitioner had received that part of the award which was offset.

Now it appears in this case, before the court here, that the respondent intimates that in the *Carrano* case (despite the city charter provisions, despite the respondent's contention therein and the holding of the Board of Tax Appeals and Circuit Court, that the amount offset against the assessment was tantamount to payment to the petitioner) that Carrano did not in fact receive payment and that this case is to be distinguished from the *Carrano* case because Wolf could have received payment. It appears that the respondent not only fails to recognize that both the Board of Tax Appeals and the Circuit Court held that the offset was tantamount to payment, but wants to go back on its argument in the *Carrano* case, which was that the offset was tantamount to payment of the award to Carrano.

Hence *Carrano* case cannot be distinguished from this case on the ground that the court in deciding the *Carrano-Neville* cases did so on the basis that the taxpayer did not receive that amount of the award which was offset by order of the City Council, whereas in this case the taxpayer, under the California statute, had the election to collect the full amount of the award and permit a lien liability which would subject the remainder of his property to sale to fasten itself to this remainder because both courts held the offset was payment to Carrano.

The second asserted ground of distinction between this case and the *Carrano* case is that "there was no separation of the awards for value of land taken and for severance damage."

The question of severance damages was ignored by both the Board of Tax Appeals and the Circuit Court in their decisions. Both based their decisions squarely upon the question of whether or not, ignoring the question of severance, the assessment could properly be deducted from the award. This applies equally to the case of *Neville v. Commissioner,* consolidated and decided at the same time. The final stipulation of the parties in submitting the matter to the Board of Tax Appeals ignores the question of any severance damage. [See Tr. of R. p. 35, last two lines, p. 36, first two lines; p. 37, par. 10.]

The memorandum opinion of the Board of Tax Appeals of the above-mentioned Carrano-Neville transcript [p. 44, last par.; p. 45, first and second par.], shows the question of severance was not an issue. We quote therefrom:

> "The issue in each proceeding, as stipulated by the parties, is whether certain benefits to property 'assessed by the City of Hartford should be deducted

from the award of damages made by said city, in determining whether the petitioner received an amount in excess of the cost of the property and thereby realized a taxable gain from the condemnation of his real estate, or whether the gross amount only of the award made by the said city should be considered in determining whether or not a taxable gain was realized.'

Again, is respondent not estopped from now claiming that the award to Carrano for severance and for land taken were not separated when he so represented in his amended answer to the Board of Tax Appeals, filed shortly before the trial, when presumably respondent had had full opportunity for complete investigation? We quote from paragraph II, subdivision (d) of the amendment to his answer:

"(d) As a result of the widening and improving of Main street by the city of Hartford, the amounts of $31,376.12 and $30,348.42 were paid to petitioner during the year 1928, which were made up of the following items:

1092-1094 Main Street.

Land taken	$ 6,400.00
Buildings taken	5,081.67
Alterations to building allowance	8,695.00
Severance damages	13,650.00
Loss of rent	6,316.00
Curb and walk damage	161.45
	$40,304.12

1100-1102 Main Street.

Land	$ 6,688.00
Buildings	4,249.83
Alterations to building	4,998.37
Severance damages	17,128.00
Loss of rent	5,138.00
Curb and sidewalk damage	162.72
	$38,364.92"

If these items were not separated, as respondent alleged, why were they so represented to the court, and from where did respondent get thm? The mere fact that the parties later in their stipulation of facts may have decided to ignore the items making up the total award, as not presenting a worthwhile issue, does not alter the fact that they were so alleged, and presumably correctly, by respondent.

The Circuit Court of Appeals in deciding these two consolidated cases (*Carrano v. Commissioner,* 70 F. (2d) 319), flatly decided the case upon the basis of the right of the taxpayer to deduct the assessment from the award. The court nowhere in that decision intimates in any way that it is considering the absence of any figures or any evidence of the existence or nonexistence of severance damage or amount thereof as in any way influencing its decision. It places its decision squarely and solely upon the ground that

> "Although the assessment was not an added cost until paid, it became cost at the moment when it was set off against the award. Receipt and payment were simultaneous; it is as false to say the award was paid before it was expended, as that it was expended before it was paid."

70 F. (2nd) page 321, lines 16-23; also page 321, line 43:

> " 'In this instance the "gain" in dispute could arise only on the hypothesis that so much of the award as paid the assessment was received before the assessment itself was paid. This was demonstrably not the case; it was received at the same time. Thus it does not affirmatively appear to be taxable "gain" at all, and the taxpayer wins. Moreover this is the direct and natural way to look at the transaction. The taxpayer has "gained" only what he has received above his costs; so far as his award has been cancelled by the assessment, it was not a "gain" at all, it is instantly absorbed by a new cost which arises and is paid without allowing him even a momentary possession of the "gain." Order reversed. Deficiency expunged.' "

The issue is further made clear by the court's quotation of the taxpayer's contention, 70 F. (2d) 320, column 2, lines 20-28:

> "The taxpayer argues that the assessment should be either deducted from the award on the ground that he never received more than the difference as added to the 'basis' as of March 1, 1913, on the ground that it had become part of the cost of the property when the award was paid. The result is the same by either method."

Again, same page, last paragraph, the court says:

> "The question is only as to when the expenditure is to be brought into the reckoning, and could not arise if the original 'basis' were greater than the award. The taxpayer would then have nothing to pay, and the assessment would remain to swell what-

ever was left of the original 'basis' when the property was sold. But here the award was greater than the 'basis,' even after the assessment was added; and if it is not deducted, the *present 'gain' is greater* and the *future 'gain,' if there is one, will be less.*" (Italics ours.)

II.

Petitioner Derived No Gain From the Award, Because Petitioner Exercised His Legal Right to Offset the Award Against the Assessment and Therefore in Fact as Well as in Contemplation of the Income Tax Amendment He Actually Received No Gain.

Section 21 of the Street Opening Act of 1903 provides that

> "the owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for nonpayment thereof, as hereinafter provided, *demand* of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessment, including any penalties and costs due thereon, the assessments shall be marked 'Paid by Offset'; and if the said amount is less than the assessment and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money, and the assessment shall, on such payment, be marked paid, the entries showing what part thereof is paid by offsetting and what part in money."

The application of such award to the assessment on the remainder is tantamount to a *pro tanto* reduction of the award, to the extent to which it is offset, and no gain can be predicated upon any award except what is left over, if any there be, not needed to pay the assessment. It was stipulated in this case that the petitioner applied all of his award, including not only that for the land taken but also that received for severance damages to the remainder and for damages to buildings upon the assessment, and in addition thereto paid the balance in cash. [R. 30-33, Stipulation of Facts, par. 7.]

III.

The Provisions of Section 23 (c) (3) of the Revenue Act of 1928, Asserted to Require Deferring Deduction of the Assessment Until the Remainder Is Sold, Have No Application and Do Not Control the Assessment Here Made to Pay the Award.

These provisions are obviously meant to apply solely to a situation where there was only an assessment to be considered and not to a compound situation like we have here where an award is given and at the same instant, or before the award is paid, an assessment is levied upon the remainder to pay the award and the assessment, as in this case, is in an amount more than twice the amount of the award for the land taken, (less the attorneys' fees and *pro rata* cost of the part taken).

Where there is no problem of taxing such an award, it is proper for Congress to prescribe that the assessment shall not be deducted as a current expense in that year but left to abide a sale, when it may be determined whether or not part of the assessment may represent some benefit which can and will be determined by the sale price. This is a reasonable regulation of Congress applied to that situation. It should be interpreted to apply solely to that kind of a problem, and that class of persons.

Here, we say with regard to the award, just what the spirit of this section says with regard to the assessment. There is no certainty that the assessment represents any benefit, and if it was made to pay the award then the calculation of the profit on the award should be left to abide the event of the sale of the remainder. This section need not and should not be construed as an attempt to create a profit by ignoring a natural expense and liability incident to the award. To do so would result in a gross injustice. Further it is a "canon of statutory construction" that "all doubts are taken in the taxpayer's favor." (*Carrano v. Commissioner,* 70 Fed. (2nd) 319, 321. Citing *Brook v. Harrelson,* 282 U. S. 55, 61; 51 S. Ct. 49; 75 L. Ed. 156.) Whatever profit, if any, in the award, will surely be ascertained and taxed by respondent when the remainder is sold. Meanwhile if there comes any benefit from the improvement it will be reflected in petitioner's annual income which respondent can tax.

IV.

If Any Profit May Be Deemed to Have Been Realized on This Award, Then the Payment of the Assessment Upon the Remainder by Offsetting the Award Amounts to an Acquisition of a Paramount Title and Interest in the Remainder, and the Remainder Being a Part and Parcel of the Same Land From Which the Part Condemned Was Taken, the Two, the Part Taken and the Remainder, Are Obviously Not Only Similar or Related in Service or Use, but Are Identical in Service and Use, and Therefore Within the Provisions of Section 112(f) of the Revenue Act of 1928 Which Prescribe That Gain Under Those Circumstances Shall Not Be Recognized.

Section 112 (f) relating to the acquisition of property similar or related in service or use, must obviously mean the acquisition to *some* title to *or interest* in property. Rarely does a person own the fee simple title including all legal and equitable interest therein. The moment he buys property he faces taxation, which becomes an equitable lien which may ripen into legal title. He may purchase a property subject to a mortgage. He may purchase it on the installment plan, in which case the seller reserves the legal title until certain conditions have been complied with; so, likewise, he may purchase an equitable interest in a property which may ripen into a title, or he may cancel an interest in a property, and if that property is similar or related in service or use to the part which was condemned, and for which he received money with which he bought this equitable title, it would appear clearly to bring the situation within the purview of section 112 (f), providing that "no gain shall be recognized" where the

proceeds of the involuntary conversion are expended in the "aquisition of other property similar or related in service or use to the property involuntarily converted (condemned)."

In this case petitioner took the money he got from his award for the land that was taken and used it to pay off an equitable lien, to-wit, the assessment upon the remainder. *It is obvious that the two properties, the one taken,* (the one for which the award was given) *and the remainder on which the assessment was levied were identical in service and use, for before the condemnation they formed one property. The only question remaining then is: Was the acquisition of the interest,* to-wit, the payment and cancellation of the assessment, an acquisition of property within the meaning of section 112 (f)? Counsel contends that the payment of the assessment was certainly an acquisition of property within the spirit and intent and meaning of section 112 (f) of the Revenue Act of 1928. If petitioner had not paid off the assessment his remainder would have been sold for the delinquent assessment and the equitable title of the city pursuant to section 28 of said Street Act of 1903, would have ripened into a legal title and he would have lost the remainder.

As a matter of fact, the respondent has previously held that this said section 112 (f) permitted the acquisition of an equitable interest in real property, and counsel contends that its interpretation then may be construed as an admission of the correctness of the reasoning and practical interpretation of that section.

The following letter, the original of which is being filed with this court, shows such interpretation of that section:

"Treasury Department
Washington

March 7, 1930.

Received
Mar 8 1930

Received
Mar 11 1930
Miller, Chevalier, Peeler & Wilson
(Seal)
Office of

Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

IT:E:RR
LAP

Miller and Chevalier,
Southern Building,
Fifteenth and H Streets, N. W.,
Washington, D. C.

Sirs:

Reference is made to the case of *Mrs. Ida B. McInnes,* 1547 Sierra Bonita Avenue, Los Angeles, California, which was presented by your Los Angeles office. Request is made, however, that reply be made to your office and a power of attorney has accordingly been submitted. *The question at issue is the application of Section 112(f) of the Revenue Act of 1928 to the transaction hereinafter described.*

It appears that Mrs. Ida B. McInnes owned a parcel of real estate embracing Lots 19 and 21 in the City of Los Angeles, located at the corner of Santa Monica Boulevard and Virgil Street on which were located three buildings. One of the buildings was a two-story hollow tile building covered with plaster which was occupied by a store below and two apartments above. The center building was a one-story frame store building covered by stucco in the front. The third building was a two-story building which was occupied by three stores below and two apartments above. It is stated that the property had cost the taxpayer originally about $32,000.00. There have been, however, several street assessments against the property since she purchased it which have brought the cost considerably above $32,000.00.

About May 1, 1929 the City of Los Angeles widened Virgil Street and by condemnation proceedings took approximately all of Lot 21. In consideration for that lot the city paid Mrs. McInnes $42,009.00 and $2,280.00 as severance damages with respect to Lot 19, making a total award of $44,289.00. Inasmuch as there was a mortgage of $9,154.00, including accrued interest, against the property, the city applied that amount of the award to the satisfaction of the mortgage lien. Mrs. McInnes received a check for the balance of $35,135.00.

In addition to the above-mentioned property the taxpayer owned another tract consisting of three improved lots, numbers 22, 23 and 24, located at the corner of Sunset Boulevard and Mariposa Street. According to the diagram submitted there are eight buildings located on the three lots. One is a two-story frame and stucco building containing four flats. On the same lot there are two bungalows used for

business purposes and two bungalows rented as dwellings. Three other bungalows are located on the other two lots and all appear to be rented as dwellings. On Lots 23 and 24 there was a mortgage of $30,000.00 and on Lot 22 there was a mortgage of $4,000.00.

"Mrs. McInnes used the money awarded her from the first herein described property which was taken by condemnation proceedings in paying off the above-mentioned mortgages on Lots 22, 23 and 24. The $30,000.00 mortgage with accrued interest amounted to $30,617.36 and the $4,000.00 mortgage with accrued interest amounted to $4,024.89. These two items plus the $9,154.00 applied by the city against the mortgage on the property taken by it makes a total of $43,796.25 used by Mrs. McInnes in paying off indebtedness on the property converted or that similar thereto.

"Request is made as to whether the transaction is governed by the provisions of section 112 (f) of the Revenue Act of 1928.

"In reply you are advised that it is the opinion of this office that the property designated as Lots 22, 23 and 24 is similar property and is related in its service and use to the property converted. Both are real properties improved with business and residential buildings which are used for income-producing purposes by reason of their rental.

"It is therefore held that *the application of the money received by the taxpayer as an award* for the involuntary conversion of her equity in the portion of the Virgil Street property taken by the city *for the acquisition of a greater equity in similar property comes within the purview of section 112 (f) of the Revenue Act of 1928.* No gain or loss was sustained

by the taxpayer in 1929. *Any excess of the total award of $44,298.00 over the amount applied by the city to the liquidation of the mortgage on the property condemned and the amount expended by the taxpayer in liquidating the indebtedness on Lots 22, 23 and 24 should be regarded as reducing the cost or other basis of the remainder of the Virgil Street property to be used for determining the gain or loss arising upon upon subsequent disposition of the property.*

"In any further communication relative to this matter, reference should be made to the symbols IT:E:RR-LAP.

Respectfully,

DAVID BURNET,
Deputy Commissioner.

By L. K. SUNDERLIN
Chief of Section."

CONCLUSION.

The facts of this case and the law induce the following conclusions:

1. That the entire street proceeding as it affected petitioner, including award and assessment, must be treated as one transaction, and only the net result considered in determining the existence of any gain.

2. That the assessment was primarily, presumptively and by an overwhelming mass of evidence, and without contradiction, a liability and, on payment, an expense incident to, and inseparably connected with, payment of the award, and hence must be treated as such expense and

deducted from the award in determining what petitioner actually received, out of said proceeding.

3. That the award cannot be considered a closed transaction unless the assessment be first deducted.

4. That petitioner expended the entire award in the acquisition of other property similar or related in service or use, in paying off the lien upon the remainder, and hence comes within the spirit and meaning of section 112 (f) of the Revenue Act of 1928.

5. That respondent has failed to show petitioner derived any gain from said award, in the sense intended by Article XVI of the United States Constitution.

6. That in fact no such gain was derived.

7. That the order of the Board of Tax Appeals should be reversed.

Respectfully submitted,

GREGORY M. CREUTZ,

Attorney for Amici Curiae.

APPENDIX.

[Herewith follows copy of letter filed with this court]:

[Crest of City of Los Angeles]

MIchigan 5211

C. K. STEELE
Director

BOARD OF PUBLIC WORKS
City of Los Angeles
Office of the
BUREAU OF ASSESSMENTS
Room 11, City Hall

Library Park
Playground
Street
Opening Widening
And Lighting
Assessments
Sanitary Sewer
Storm Drain
Street
And Special
Improvement
Assessments

"Address All Communications to Bureau of Assessments"

Los Angeles, Calif.

TO WHOM IT MAY CONCERN:

The Bureau of Assessments of the City of Los Angeles does hereby certify to the following facts:

That said Bureau of Assessments of the City of Los Angeles, hereinafter referred to as "the Bureau of Assessments," had charge of making up the assessment which was finally adopted by the City Council of the City of Los Angeles as the assessment levied in connection with that certain street proceeding popularly known as "The Five Finger Plan" and described by Ordinance of Intention of the City of Los Angeles No. 53214, and with the incidental work of estimating the supposed benefits estimated to accrue to the several parcels in the proceeding, and upon that basis proportioning the cost of said proceeding among the several parcels in the assessment district;

That the undersigned, Laurence J. Thompson, is now, and for more than ten years last past has been employed in said Bureau of Assessments; that he is now and was at the time of the making of the assessments levied on the parcels in said Five Finger Plan, Chief of the Opening and Widening Division of the said Bureau of Assessments, and as such his duties during that time have been to have immediate charge of the work of distributing proportionately the costs of street proceedings among the several parcels in the assessment districts covered by said street proceedings, and that he was in immediate charge of such work, and actually handled

the work of proportioning the cost of said street proceeding mentioned above as the Five Finger Plan, and is, and was at the time of the making of assessments therein, fully familiar with all the details of the work connected with making said assessments on the several parcels included in the assessment district of said proceeding, and with the manner in which, and the factors which were considered in arriving at the several assessments on the several parcels in said assessment district;

That he is now, and was at the time of making said assessment on said street proceeding, fully familiar with all proceedings which were carried out under or pursuant to said Ordinance of Intention No. 53214, said ordinance ordering said work, No. 54065, and with the amount of the awards which were decreed in said Superior Court case No. 202550, brought pursuant to and in conformity with said Ordinance of Intention No. 53214, and with the items making up the individual awards, to-wit, the award for land taken, for damage to buildings, if any, and for severance, if any.

That jurisdiction to proceed with said street proceeding and every part thereof was acquired under and by virtue of said Ordinance of Intention No. 53214, the notice of the hearing thereon and the hearing held pursuant to said ordinance and said notice.

That no part of said street proceeding known as the Five Finger Plan, and hereinafter referred to simply as "said street proceeding," involved any paving or any other work done to the streets involved in said proceeding; that the whole of said street proceeding involved merely the acquisition of the land necessary to open and widen Ivar Avenue, Cahuenga Avenue, and other streets, all of which are located in Hollywood, California.

That the hereinafter data, facts and figures are exact and true copies of the records of the Bureau of Assessments in connection with said street proceeding, and said records of said Bureau are now, at the time of making this certificate, in the possession and under the control of the undersigned, Laurence J. Thompson. That said records show the following facts in connection with said street proceeding and the assessments levied in connection therewith to pay the cost of said street proceeding:

The photostatic copies of three maps attached hereto and made a part hereof are true photostatic copies of three portions of said street proceeding and indicate: (1) and (2) opening and widening of Ivar Avenue in said street proceeding, and (3) opening and

widening of a portion of Cahuenga Avenue in said street proceeding; that each said map shows the part acquired in said street proceeding with the number of the parcel corresponding to the parcel number set forth in the complaint and in the judgment in said Superior Court case No. 202550; that said maps show also the assessment numbers of the parcels assessed to pay the cost of said street proceeding.

That the total award for land taken in said street proceeding, as shown by the judgment in said case No. 202550, was $4,044,-961.05; that the assessment district paid $4,013,432.25; that the incidental expenses of said proceeding, details of which are set forth in footnote to Schedule 2 attached hereto, were $117,179.20; that the City of Los Angeles allocated out of public funds $148,-707.00, or approximately 3% of the total cost of said proceeding; that the balance of said cost, to-wit, approximately 97% thereof, was paid by the assessment district.

That, while those who received awards and paid assessments upon the remainder of the land, part of which was taken in said proceeding, constituted a smaller number than those who were assessed but received no awards, yet the smaller number receiving awards paid by far the greater share of the cost of said proceeding. The persons receiving awards and having an assessment levied upon the remainder of the land, part of which was taken in said proceeding, and for which said awards were made numbered 372. The details of said assessments against those receiving awards are shown in Schedules 1 and 3 annexed hereto and made a part hereof.

That the assessments levied on the various parcels in said proceeding were determined, fixed and levied by said Bureau of Assessments, pursuant to the provisions of section 16 of the Street Opening Act of 1903. Said section 16 provides that the "Superintendent of Streets (in this particular case the Bureau of Assessments) shall proceed to assess the total expense of the total improvement (less any allocation made by the City of Los Angeles) upon and against the lands, * * * *in proportion* to the benefits to be derived from said improvement. That the Bureau of Assessments has construed said section to mean that the expense shall be distributed *in proportion* to the respective benefits which it estimates the respective lots in the Assessment District receive from the improvement *without regard to the actual benefit* (except inso-

far as the actual benefit forms the basis upon which to fix the assessment by mathematical proportion).

Under section 16 of the Street Opening Act of 1903 the Bureau of Assessments of the City of Los Angeles, in levying the assessment on the parcels assessed in said street proceeding (including those on Ivar Avenue) did not determine or fix any of the amounts so assessed upon the theory or basis that the amount so assessed, either collectively or individually, represented what in its opinion was the amount of benefit which it estimated would accrue to the parcels assessed, but rather to the contrary the amounts so assessed were in excess of any possible benefit it could foresee likely to accrue to said parcels, either collectively or individually. The reason for this is that the peculiar language of section 16 of said "Act" requires the Bureau to spread said whole cost upon the assessment district fixed in the Ordinance of Intention, regardless of the actual benefit. The only thing which the Bureau observed in making the assessment was to distribute said cost in proportion to the benefit which each parcel was thought likely to enjoy from the street proceeding.

In other words, under this section an actual assessment may be one-half of the estimated benefit, or it may be three, five or ten times the estimated benefit. The function and practice of this Bureau in connection with this project was not to determine and provide in said assessment that the amount assessed was equal to the actual benefit estimated, but merely to arrange an assessment so that the expense of said proceeding (as finally fixed by the court, plus the expenses) was proportionately divided among the respective parcels according to the respective benefits, which by reason of the facts it was estimated would be enjoyed by the various parcels from said proceeding. In other words, if Parcel 152 were determined by the Bureau to have an estimated actual benefit of $200 from said proceeding and other parcels were estimated variously to have actual benefits of various sums which were fixed, and the total amount of estimated actual benefits accruing to these various parcels in the assessment district equalled the sum of $1,040,000, this sum being roughly one-fourth of the $4,162,140.25 which had to be raised in said street proceeding, each parcel would have to bear an assessment of four times the estimated benefit.

Furthermore under the 1903 Street Opening Act as it stood at the time of this assessment there was no provision of law whereby the allocation made by the City in the original ordinance

of intention of $148,708.00 could be raised to supply the difference between any estimated actual benefit and the assessment which had to be levied to bear the actual cost of $4,162,140.25. Unless the precise sum were allocated in the Ordinance of Intention, the City Council lost jurisdiction to increase it later, no matter how much the total assessment exceeded the total benefit.

Said Street Opening Act of 1903 was amended after said assessments were levied as to permit the legislative body, such as the City Council, to increase the allocation, *so as to make up by public funds,* as far as possible, the *difference between the actual benefit and the expense that had to be levied upon the property,* regardless of how far the assessment exceeded the actual benefit.

In estimating actual benefit believed by the Bureau likely to accrue to the respective parcels in the assessment district as a result of said street proceeding, and as a basis for fixing said proportionate assessment, many factors were considered and a long range view over a long period of time made of prospective benefits. Current general as well as local economic conditions existing in 1929 were among the factors considered by the Bureau in estimating said benefits and in fixing said respective assessments. General economic conditions were at high peak. *Said benefits so estimated to accrue to said respective parcels from said proceeding were predicated to a large extent upon a substantial continuance of the prosperous conditions prevailing in the spring of 1929.* Another factor of special importance considered in estimating said benefits was the character of the neighborhood and its likelihood to develop and increase in its income-bearing possibilities, including the possibility of an increase in business uses of the parcels assessed; *and, particularly, in levying the assessment of Ivar Avenue, it was anticipated that Ivar Avenue,* below Hollywood Boulevard and down to Sunset Boulevard, *would develop into a high-class business district.* It was further considered, in the supposed development of Ivar Avenue, that Ivar Avenue (along with other streets in the Five Finger Plan) was part of the outlet from San Fernando Valley as it comes through Cahuenga Pass, and that Cahuenga

Avenue being widened by said proceeding up to the entrance of Cahuenga Pass at Highland Avenue, and that Cahuenga Avenue as widened would provide a logical outlet from the San Fernando Valley for traffic moving through Cahuenga Pass, down to Hollywood Boulevard and on to Los Angeles, and that Ivar Avenue would share in the business development arising from this traffic moving chiefly down Cahuenga Avenue.

The benefits estimated to accrue to Ivar Avenue landowners and other street in the Five Finger Plan in this street proceeding did not take into consideration the development of Highland Avenue into a secondary state highway from Cahuenga Pass to Santa Monica Boulevard and a consequent probable diversion into Highland Avenue of considerable traffic from Cahuenga Avenue and Ivar Avenue, and other streets which form part of the Five Finger Plan leading into Cahuenga Avenue. Nor was consideration given at that time to the fact that the development as a secondary highway of Highland Avenue largely at public expense might put the owners of property fronting on Highland Avenue in a position to finance the development of a high-class business section on Highland Avenue if a large part of the expense of the widening and paving of Highland Avenue were carried on at public expense, thus putting such owners of said frontage in a better financial condition to develop the property in keeping with the new development. Nor was consideration given to the fact that the development of Highland Avnue into such secondary highway and the development by the owners of their frontage on Highland Avenue, as aforesaid, might detract substantially from development of a high-class business section along Ivar Avenue and other streets in the Five Finger Plan.

These factors were not considered at the time of levying the assessment on Ivar Avenue and the aforesaid development of Highland Avenue was in the formative stage, and there was no indication at that time that Highland Avenue would be developed and widened the State of California bearing one-third of the cost of acquiring the land for widening and paying all of the cost of paving with the resulting benefits to Highland Avenue as a competitive business street.

In levying the assessment on Ivar Avenue and other streets in the Five Finger Plan it was the opinion of the Bureau of Assessments that the amount actually assessed against each individual parcel in the assessment district, including all those fronting on Ivar

Avenue, not only collectively exceeded the collective estimated actual benefit to accrue to those parcels from the street proceeding, but that in each individual case the assessment levied against the individual parcel was in excess of the actual benefit estimated to accrue to that parcel in said proceeding, but each parcel was assessed its fair proportion of the total expense of said proceeding based upon the relative benefit which each lot would enjoy from that proceeding.

Though the final amounts levied against the individual parcels, while in excess of the actual benefit to accrue, nevertheless had to be placed against these parcels in order that they would total the grand total cost of the proposed improvements, less said allocation. In other words, the actual benefit assessment had to be stepped up proportionately and mathematically so that the total of the assessment so increased equal the total cost which had to be raised by the assessment.

That on Cahuenga Avenue between Highland Avenue and Dix Street in said Five Finger Plan, there was levied upon the frontage of Cahuenga Avenue, as widened, assessments of approximately $75.00 per front foot to pay for the cost of said proceeding. The detail of these assessments in shown in Schedule 2 attached.

That in levying said assessment on Cahuenga Avenue it was recognized that it was unlikely that there would be any appreciable change in the residential character of the improvements put upon said respective parcels on Cahuenga Avenue between said streets, despite said widening of Cahuenga Avenue by this proceeding, at least for a long time forward, for various reasons, including the following: Cahuenga Avenue at this point has a heavy grade and a winding street and is somewhat distant from the business section of Hollywood; the hinterland behind Cahuenga Avenue here is very hilly and would not support much business; there was already upon said lots residences involving heavy investment and in addition some residential income property, which would not justify them being moved off to be replaced by business buildings.

That attached hereto are four schedules, which show the following:

Schedule 1. Amounts of the awards given in said Superior Court case No. 202550, for land taken to open and widen Ivar Avenue in said street proceeding, and opposite the amount of award the amount of assessment which was levied against the remainder of the parcel, part of which was taken in said street

proceeding, so as to enable comparison to be made between said award for the land taken and the amount of assessment against the remainder. The amount of award is the amount for the land taken and does not include any severance damage to the remainder or award for buildings destroyed or taken, or any reconditioning of any buildings.

Footnote of Schedule 1 contains a detailed analysis of total award for land, severance and improvements on Ivar Avenue corresponding to the parcel numbers set forth in the text of Schedule 1.

Schedule 2. Total amount of awards for land taken on Cahuenga Avenue between Highland Avenue and Dix Street in said Street proceeding, (including severance, and damage to buildings) and amount of assessment levied against the remainder of said parcels in said street proceeding to pay the cost thereof.

That Parcel No. 151 in said case No. 202550 was awarded for land taken the sum of $23,549.00, and the remainder thereof was assessed the sum of $38,713.60.

That the total of the awards in the block in which said parcel #151 is located, to-wit, on Ivar Avenue, as opened up between Selma Avenue and Sunset Boulevard, for the land taken was $217,209.00, and the assessments levied upon the remainder of the parcels, from which said award was given, amounted to $188,044.41, or approximately 86% of the amounts of awards for the land taken.

That on the whole of Ivar Avenue opened or widened by said proceeding, the amount received for land taken in said proceeding (exclusive of loss or damage to buildings or severance damage to the remainder) by those receiving awards was $637,563, while these same persons paid upon the remainder of the parcels part of which was taken in said proceeding $443,432.73, that is to say they paid back by way of assessment upon the remainder 69.5% of the total amount received by them as awards solely for the land taken, irrespective of any building damage or severance.

Respectfully submitted:

BUREAU OF ASSESSMENTS

By.....
Laurence J. Thompson
Chief of Opening and Widening Division.

SCHEDULE 1.

Ivar Avenue Comparison of Awards and Assessments.

This schedule shows amount of the awards given in said Superior Court case No. 202550, for land taken to open and widen Ivar Avenue in said street proceeding, and opposite the amount of award the amount of assessment which was levied against the remainder of the parcel, part of which was taken in said street proceeding, so as to enable comparison to be made between said award for the land taken and the amount of assessment against the remainder. The amount of award is the amount for the land taken and does not include any severance damage to the remainder or award for buildings destroyed or taken, or any reconditioning of any buildings.

IVAR AVENUE—Yucca to Hollywood

Parcel No.	Award for land taken	Assessment No.	Amount
98	17,431	(213	4,447.98
		(214	5,597.41
99	2,640	215	8,319.17
100	3,868	216	11,785.49
101	3,042	217	9,012.43
102	3,133	218	9,012.43
103	2,480	219	6,932.64
104	2,550	(220	2,079.79
		(221	4,852.85
105	3,519	(222	4,159.58
		(223	4,852.85
106	4,675	(224	4,159.58
		(225	7,625.90
107	1	(226	1.00
		(227	1.00
	$ 43,339		$ 82,840.10

HOLLYWOOD TO SELMA

Parcel No.	Award for land taken	Assessment No.	Amount
141	160,000	462	23,293.67
142	17,995	458	27,988.80
143	126,000	463	32,701.27
144	38,870	(453	12,132.12

Parcel No.	Award for land taken	Assessment No.	Amount
		(454	12,132.12
		(455	12,132.12
		(456	12,132.12
		(457	12,132.12
145	5,085	452	12,132.12
146	29,465	473	15,771.76
	$377,415		$172,548.22

SELMA TO SUNSET

Parcel No.	Award for land taken	Assessment No.	Amount
147-148	8,352	(451	4,355.43
		(430	7,962.14
149	65,242	(428	12,317.57
		(429	12,317.57
		(431	7,021.03
		(432	13,026.43
		(433	10,743.86
150	11,578	(434	6,683.07
		(435	9,244.68
151	23,549	(398	19,243.28
		(436	19,470.32
152	16,118	(397	9,100.82
		(437	9,043.63
153	70,180	438	21,082.16
154	18,890	395	12,998.70
155	3,300	396	13,433.72
	$217,209		$188,044.41

Total of above totals	$ 43,339	$ 82,840.10
	377,415	172,548.22
	217,209	188,044.41
Grand totals	$637,963	$443,432.73

(1) This footnote gives a detailed analysis of total award for land, severance and improvements on Ivar Avenue corresponding to the parcel numbers set forth in the text of Schedule 1.

Segregation of Awards on Ivar Avenue

YUCCA TO HOLLYWOOD

Parcel No.	Land	Severance	Improvements	Total
98	17,431	12,174	10	29,615
99	2,640	.....	70	2,710
100	3,868	.....	55	3,923
101	3,042	.....	25	3,067
102	3,133	.....	12	3,145
103	2,480	.....	10	2,490
104	2,550	.....	10	2,560
105	3,519	.....	23	3,542
106	4,675	.....	....	4,675
107	1	.....	....	1
	$ 43,339	$12,174	$ 215	$55,728

HOLLYWOOD TO SELMA

Parcel No.	Land	Severance	Improvements	Total
141	160,000	16,000	2,496	178,496
142	17,995	.....	787	18,782
143	126,000	.....	35,209	161,209
144	38,870	7,628	1,963	48,461
145	5,085	.....	.....	5,085
146	29,465	4,926	3,109	37,500
	$377,415	$28,554	$43,564	$449,533

SELMA TO SUNSET

Parcel No.	Land	Severance	Improvements	Total
147-8	8,352	3,018	4,338	15,708
149	65,242	13,308	9,394	87,944
150	11,578	1,436	3,490	16,504
151	23,549	4,006	10,267	37,822
152	16,118	4,372	12,472	32,962

Asst. No.	Amount	Asst. No.	Amount	Asst No.	Amount
646	7885.88	805	1247.88	758	1774.76
603	5199.48	800	1247.88	756	9575.97
604	5199.48	799	1247.88	755	11,893.90
610	2249.30	820	1299.87	568	819.44
643	7255.36	821	1299.87	569	3018.47
611	4977.64	794	1247.88	570	2599.74
642	3284.69	785	4285.20	571	2599.74
640	3303.40	826	65,998.74	572	2599.74
639	869.35	784	8624.07	574a	363.96
638	1936.98	780	6884.63	574b	259.97
637	2870.11	779	2487.95	563	836.08
636	3377.58	775	2599.74	562	823.08
635	1604.91	776	2599.74	580	519.95
612	1067.63	774	2599.74	581	519.95
617	2538.04	773	2599.74	559	6214.03
618	2131.79	772	2599.74	558	3466.32
619	1448.92	789	755.48	557	3466.32
620	3466.32	790	680.09	556	1386.53
621	3466.32	791	680.09	555	1386.53
622	3466.32	792	680.09	554	2773.06
623	3466.32	793	1510.97	553	2079.79
624	4052.82	770	2495.75	552	2079.79
551	1386.53	1110	1948.77	1094	2079.79
550	3466.32	1111	2255.88	1344	2079.79
549	3466.32	1112	2255.88	1345	2079.79
548	4159.58	1095	2079.79	1346	2079.79
587	818.74	1096	2079.79	1347	2079.79
588	3466.32	1097	2079.79	1348	2079.79
589	3466.32	1098	2079.79	1349	2079.79
590	1733.16	1099	2079.79	1350	2079.79
591	1733.16	1100	2079.79	1351	2079.79
592	3466.32	1101	2079.79	1352	2079.79
593	4159.58	1102	2079.79	1353	2079.79
594	6200.55	1103	2079.79	1354	2079.79
547	9903.97	1104	2079.79	1355	2279.45
1072	3582.79	1105	2079.79	1302	2279.45
1073	1880.83	1106	2275.29	1303	2079.79
1074	2343.23	1083	2275.29	1304	2079.79
1075	2253.11	1084	2079.79	1305	2079.79
1076	2253.11	1085	2079.79	1306	2079.79

Asst. No.	Amount	Asst. No.	Amount	Asst No.	Amount
1077	2253.11	1086	2079.79	1307	2079.79
1078	2253.11	1087	2079.79	1308	2079.79
1079	4511.76	1088	2079.79	1309	2079.79
1080	2255.88	1089	2079.79	1310	2079.79
1082	1665.22	1090	2079.79	1311	2079.79
1107	2255.88	1091	2079.79	1312	2079.79
1108	2255.88	1092	2079.79	1314	1551.53
1109	1804.57	1093	2079.79	1343	2287.77
1342	2079.79	1280	1733.16	1258	1733.16
1341	1663.83	1281	1733.16	1257	1733.16
1340	1663.83	1282	1733.16	1256	1733.16
1339	1663.83	1283	1733.16	1255	1733.16
1338	1663.83	1284	1733.16	1254	1733.16
1337	1663.83	1285	1733.16	1253	1733.16
1336	2079.79	1286	1733.16	1252	1733.16
1335	2079.79	1287	1733.16	1251	1906.48
1334	2079.79	1288	1733.16	1290	1733.16
1333	2079.79	1289	1906.48	1291	1733.16
1332	2079.79	1276	1335.57	1292	1733.16
1331	2130.40	1273	1733.16	1293	1733.16
1328	1652.19	1272	1733.16	1294	1733.16
1325	2079.79	1271	1733.16	1295	1733.16
1324	2079.79	1270	1733.16	1296	1733.16
1323	2079.79	1269	1733.16	1297	1733.16
1322	2079.79	1268	1733.16	1298	1733.16
1321	2079.79	1267	1733.16	1299	1733.16
1320	2079.79	1266	1733.16	1300	1733.16
1319	2079.79	1265	1733.16	1301	1899.54
1318	2079.79	1264	1733.16	1044	1733.16
1317	2079.79	1263	1906.48	1045	1733.16
1316	2079.79	1262	1733.16	1046	1733.16
1315	2287.77	1261	1733.16	1047	1733.16
1278	1828.48	1260	1733.16	1048	1733.16
1279	1733.16	1259	1733.16	1049	1733.16
1050	1733.16	1023	1715.83		

Asst. No.	Amount	Asst. No.	Amount
89	2,582.06	54	3,882.28
93	1,294.32	55	3,882.28
20	1,632.00	56	3,882.28
23	2,270.44	57	3,882.28
24	2,057.61	58	3,882.28
25	2,600.00	59	3,882.28
26	2,600.00	60	3,959.00
27	2,580.33		
28	2,750.18	Total—	$190,412.16
(94	7,225.90		
(95	1,776.13		
(96	1,732.47		
(97	3,508.60		
98	1,753.96		
99	1,753.96		

State of California, County of Los Angeles—ss.

LAURENCE J. THOMPSON, being first duly sworn deposes and says: That he is chief of the Opening and Widening division of the Bureau of Assessments of the City of Los Angeles, and as such chief he is fully familiar with all the proceedings mentioned in the within certificate, and with the action taken under and pursuant to said proceedings. That he has read the foregoing certificate and knows the contents thereof, and that same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it, and each and every statement therein made, to be true.

LAURENCE J. THOMPSON

Subscribed and sworn to before me this 1st day of March, 1935.

(Seal) AUGUST P. COVIELLO

Notary Public in and for the County of Los Angeles, State of California.

The Following Excerpts From the Street Opening Act of 1903, California Stats. 1903, p. 376, Approved March 24, 1903, as Amended, Are Pertinent to This Case.

"Power to open streets, etc.

"Sec. 1. Whenever the public interest or convenience may require, the city council of any muncipality shall have full power and authority to order the laying out, opening, extending, widening or straightening, * * * of any one or more of any public streets, * * * within such muncipality, and to acquire, by condemnation, any and all property necessary or convenient for that purpose or any interest therein including * * *."

"Declaration of intention. City may pay percentage.

"Sec. 2. Before ordering any improvement to be made * * * the city council shall pass an ordinance declaring its intention so to do. Said ordinance shall be sufficient if it describes the land necessary or convenient to be taken for the proposed improvement, and describes briefly and in general terms the proposed improvement and the district to be benefited by said improvement and to be assessed to pay the expense thereof, to be known as the assessment district, and refers to a map or plat, approved by the city council, which shall be on file in the office of the city clerk or city engineer at the time of passing the said ordinance which said map shall indicate the land necessary or convenient to be taken for the proposed improvement and shall indicate by a boundary line the extent of the territory to be included in the assessment district. Said map shall govern for all details as to the extent and description of the land to be taken for the proposed improvement and as to the extent of said assessment district. * * * Said city council may in its discretion declare that the whole or any percentage of, or any sum toward the expense of said improvement will be paid by said muncipality, in which case the sum or percentage to be so paid shall be stated in said ordinance of intention. (As amended, Statutes 1927, Chap. 674.)"

"Notice to be posted. Publication. Notice to be mailed to owners. Affidavit of Clerk.

"Sec. 3. The street superintendent shall thereupon cause to be conspicuously posted * * * at not more than three hundred feet apart, notices (not less than three in all) of the passage of said ordinance. * * *"

"Protests. Hearing, Notice and Decision. Jurisdiction.

"Sec. 4. Any persons interested, objecting to said improvement or to the extent of the assessment district, may file a written protest with the clerk of the city council, within thirty days after the first publication of the notice required by section three of this act. * * * " "The city council shall thereupon fix a time for hearing said protests * * * and shall cause notice of the time of such hearing to be published * * * At the time set for hearing said protests, the city council shall proceed to hear and pass upon all protests so made, and its decision shall be final and conclusive; * * *" "If no protests in writing have been filed within the time hereinbefore provided for filing the same, or * * * be found by the city council to be insufficient, or shall be overruled, or if a protest against the proposed assessment district shall be heard and denied, immediately thereupon the city council shall be deemed to *acquire jurisdiction to order the proposed improvement.* (As amended, Statutes 1927, Chap. 674.)"

"Actions, when to be brought. Procedure.

"Sec. 6. Upon the passage of said ordinance ordering said improvement, the city attorney shall bring said action * * * Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure * * * except in the particulars otherwise provided for in this act. (Amended, Statutes 1925, p. 87.)"

"Complaint, what shall set forth.

"Sec. 7. The complaint shall set forth, or state the effect of, the ordinance of intention, and the ordinance ordering the improvement, but need not set up any other proceedings had before the bringing of the action. *Said ordinances shall be conclusive evidence, in such action, of the public necessity of the proposed improvement,* and also that the same is located in the manner which will be most *compatible with the greatest public good and the least private injury.*"

"Abandonment of proceedings.

"Sec. 14. The city council may, *at any time prior to the payment* of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice; and if any of the assessments levied to pay the expense of the improvements, as hereinafter provided, shall have been actually paid in money at the time of such abandonment, the same shall be refunded to the persons by whom they were paid. If the proceedings be abandoned or the action dismissed no attorney's fees shall be awarded the defendants or either or any of them. (Amendment approved April 12, 1911. Statutes 1911, p. 894. Also amended in 1909. Statutes 1909, p. 1040.)

"Diagram of improvement.

"Sec. 15. Upon the *entry of the interlocutory judgment,* the city council shall order the city engineer * * * to make and deliver to the street superintendent, a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. Said diagram shall show the land to be taken for the proposed improvement, and also each separate lot, piece or parcel of land within the assessment district, and the dimensions of each such lot, piece, or parcel of land, and the relative location of the same to the proposed improvement."

"Assessment, how made and what to show.

"Sec. 17. The street superintendent shall make the said assessment in writing. Such assessment shall describe each lot, piece, or parcel of land assessed for said improvement, and shall designate each such lot, piece, or parcel of land with an appropriate number. The street superintendent shall also designate each such lot, piece, or parcel of land on said diagram, with the number corresponding with the number thereof in said assessment, and said diagram shall thereupon be attached to and become and be deemed to be a part of said assessment. Such assessment shall show the total sum to be raised thereby, as hereinbefore provided, and also the items of such total sum, and opposite each lot, piece, or parcel of land assessed, the amount assessed thereon, and the name of the owner thereof, if known to the street superintendent; or if the owner's name is unknown, the word 'Unknown' shall be written instead of such name.

"Notice of filing of assessment.

"Sec. 18. As soon as said assessment is completed the street superintendent shall file the same * * * with the clerk of the council, who shall give notice of such filing by publication * * * Said notice shall require all persons interested to file with said clerk their objections, if any they have, to the confirmation of said assessment, within thirty days after the date of the first publication of such notice, which date shall be stated in said notice.

"Objections.

"Sec. 19. All objections shall be in writing and shall be filed with said clerk within the time prescribed in the notice required by section 18 hereof. The clerk shall * * * lay said assessment and all objections so filed with him, before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment, and may confirm, modify, or correct said assessment, or may order a new assessment, upon which like proceedings shall be had, as in the case of an original assessment; or if there be no objections, the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment, and the action of the council upon such objections and assessment shall be final and conclusive in the premises."

"Delinquent assessment. Notice. Sale.

"Sec. 23. The street superintendent shall, within ten days from the date of such delinquency, begin the publication of a list of the delinquent assessment * * * The *street superintendent shall* publish a * * * *notice that unless each assessment delinquent* * * * thereon, *is paid,* the *property upon which such assessment is a lien, will be sold at public auction at a time and place to be specified in the notice.* * * *"

"Deed, when executed. Cost. Service of Notice. Redemption.

"Sec. 28. At any time after the expiration of twelve months from the date of sale, the street superintendent must execute to the purchaser or his assignee on his application, if such purchaser or assignee has complied with the provisions of this section, a deed of the property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof and the fact that no person has redeemed the property. * * *"

"Deed is prima facie regular.

"Sec. 29. The deed of the street superintendent shall be *prima facie* evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee."